Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

WHEELING & LAKE ERIE RAILWAY COMPANY,

Petitioner,

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

Gregory G. Fletcher
BAKER, DONELSON,
BEARMAN & CALDWELL
2000 First Tennessee Building
165 Madison Avenue
Memphis, TN 38103
(901) 526-2000
Counsel of Record for Petitioner

Richard R. Wilson, P.C.
1126 Eighth Avenue, Suite 403
Altoona, PA 16602
(914) 944-5302

July 12, 1999

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QUESTION PRESENTED FOR REVIEW

Whether an assessment imposed on railroads by the Commonwealth of Pennsylvania for the construction of a new public highway bridge constitutes a discriminatory "tax" within the meeting of 49 U.S.C. § 11501, where the assessment relieves the Commonwealth of part of the general expense of government, where no portion of the assessment is used for regulatory purposes, and where railroads are the only transportation entities in Pennsylvania that are involuntarily assessed the costs of constructing and maintaining public highways and bridges crossing their private rights-of way.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The parties to the proceeding in the court below were plaintiff-petitioner, Wheeling & Lake Erie Railway Company, and defendants-respondents, the Public Utility Commission of the Commonwealth of Pennsylvania; David W. Rolka, Chairman of the Pennsylvania Public Utility Commission; Joseph Rhodes, Jr., John M. Quain, Lisa Crutchfield, and John Hanger, in their Official capacities as members of the Pennsylvania Public Utility Commission; Scott Township, Pennsylvania; and James P. Mulligan, Chairman of the Board of Commissioners of Scott Township, Pennsylvania.

Petitioner, Wheeling & Lake Erie Railway Company, is a Delaware corporation, with its principal place of business in Brewster, Ohio. Wheeling & Lake Erie Railway Company is a subsidiary of Wheeling Corporation, the stock of which is not publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Wheeling & Lake Erie Railway Company ("Wheeling"), respectfully prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case March 31, 1998.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 141 F.3rd 88 (3rd Cir. 1998), and is reproduced in Appendix ("App.") at App. 1 through 46. The unreported opinion of the United States District Court for the Western District of Pennsylvania which adopted the Magistrate Judge's Report and Recommendation is reproduced at App. 47 through 53. The Report and Recommendation of the Magistrate Judge of the United States District Court for Western District of Pennsylvania is reproduced at App. 54 through 76.

JURISDICTIONAL STATEMENT

Jurisdiction of the United States District Court for the Western District of Pennsylvania was based upon 49 U.S.C. § 11501, and 28 U.S.C. § 1331. Jurisdiction of the United States Court of Appeals for the Third Circuit was based on 28 U.S.C. § 1291.

The order and judgment of the Court of Appeals were entered March 31, 1998. A timely Petition for Rehearing was filed by Wheeling on April 13, 1998. Wheeling's Petition for Rehearing was denied April 15, 1999. A copy of the order denying Wheeling's Petition for Rehearing is reproduced at App. 74 through 76.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), codified in 1978 at 49 U.S.C.§ 11503, and recodified in 1995 at 49 U.S.C. § 11501.

The language of 49 U.S.C. § 11501 as codified differs from the language of Section 306. Neither the 1978 nor 1995 codification can be construed as making any substantive change to the meaning of Section 306. *See*, Pub. L. No. 95-473, § 3(2), 92 Stat. 1466 (1978); Burlington Northern RR v. Oklahoma Tax Comm., 481 U.S. 454, 457 n.1 (1987) (1978 codification), and H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 193 (1995) (1995 codification). Section 306 is reprinted at App.77 through 80 of this Petition; the provisions of 49 U.S.C. § 11501 are reprinted at App. 81 through 83.

Generally, § 11501 prohibits state tax discrimination against rail carriers subject to the jurisdiction of the Surface Transportation Board. §§ 11501(b)(1) through (b)(3) prohibit various forms of discriminatory state property taxation, and § 11501(b)(4), which is the focus of this litigation, prohibits states from imposing "another tax that discriminates against a rail carrier...." § 11501(c) expressly confers jurisdiction on federal district courts to prevent violations of the Act, notwithstanding 28 U.S.C. § 1341, amount in controversy, or citizenship of the parties.

STATEMENT OF THE CASE

1. Purpose of 49 U.S.C. § 11501.

§ 11501 was enacted as part of the Railroad Revitalization and Regulatory Reform Act of 1976, which is an act "To provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." Pub.L. No. 94-120, 90 Stat. 31, 33. To help achieve this goal, Congress expressly prohibited discriminatory state taxation of the railroad industry and sought to eliminate the long-standing burden on interstate commerce resulting from discriminatory state taxing schemes. Burlington Northern R.R. v. Oklahoma Tax Comm., 481 U.S. 454, 457 (1987). The legislative history of § 11501 plainly reflects Congress' concern that local communities were become increasingly reliant on taxing railroads, particularly in the Northeast, and that this reliance had contributed to the deteriorating financial condition of railroads in the region. *See, e.g.*, S. Rep. No. 94-499, reprinted in 1976 U.S. Code Cong & Ad. News, p.17. Thus, the basic purpose of § 11501 was to lift the often heavy hand of state and local taxation from railroads, Burlington Northern R.R. v. City of Superior, 932 F.2d 1185, 1186 (7th Cir. 1991), and to prevent a shift in the burdens of state and local government to the railroad industry.

2. The State Assessment at Issue.

Under Pennsylvania's "Highway-Railroad and Highway Bridge Budget Act of 1982-83" ("Act 235," also known as the "Billion Dollar Bridge Program"), the General Assembly of the

Commonwealth of Pennsylvania appropriated funds for the removal, rehabilitation or replacement of approximately 400 local highway bridge projects located in approximately 300 municipalities throughout the state. Under Act 235, the Commonwealth financed 80 percent of the total cost of local highway bridge projects that were not selected for federal funding. Local governments (counties and municipalities) financed 20 percent of the total cost of such projects unless, in the case of a highway bridge crossing a railroad right-of-way, the Pennsylvania Public Utility Commission assessed a portion of the cost against one or more railroads.

The Pennsylvania Public Utility Commission ("Commission") is an agency of the Commonwealth authorized, *inter alia*, to assess against "public utilities" the costs of constructing, relocating, altering, protecting or abolishing a public highway crossing. For this purpose the Commission regards railroads as "public utilities." *See* 66 Pa. CSA § 102 and 66 Pa. CSA § 2704(a).

In 1991, the Commission approved plans submitted by Scott Township, Pennsylvania, for the replacement of an old highway bridge that crossed Wheeling's track and right-of-way in Allegheny County. This highway bridge had been closed to vehicular traffic since 1982 and was specifically designated in Act 235 for replacement. The Commission directed Scott Township to construct a new highway bridge at its initial expense pending further hearings by the Commission on the allocation of costs.

Construction of the replacement bridge -- now a concrete and steel structure crossing Wheeling's right-of-way

in a single span -- was completed in 1994 at a cost of approximately $2,147,600. After completion of construction, the Commission conducted hearings on the allocation of construction costs and future maintenance costs among Allegheny County, Scott Township, and various public utilities, including Wheeling. By decision dated September 22, 1994, the Commission ordered Wheeling to pay Scott Township 3 percent of the total cost incurred in constructing the replacement bridge (approximately $64,428), and to pay 15 percent of the future costs incurred by the Township in maintaining the bridge structure, exclusive of snow and ice removal.

No part of this bridge assessment was used by the Commission for regulatory purposes. Under Commonwealth guidelines, bridge assessments against railroads are applied first to reduce the local governments' share of costs and, if the railroads' share exceeds the full local share, to reduce the Commonwealth's share. Here, the Commission allocated 80% of the construction costs to the Commonwealth; 7% to Scott Township; 7% to the Pennsylvania Department of Transportation; 3% to a railroad that is not a party; and 3% to Wheeling.

Railroads are the only transportation utilities in Pennsylvania that are involuntarily assessed the cost of constructing and maintaining a public highway bridge crossing their private rights-of-way, and the Commission's bridge assessment is **not** "in lieu" of other state and local taxes. In addition to being assessed part of the cost of the highway bridge, Wheeling pays Public Utility Realty Taxes annually to the Commonwealth of Pennsylvania (a portion of which is

distributed to Scott Township), and pays property taxes to Allegheny County and Scott Township annually on its non-operating property located there. Wheeling pays gross receipt taxes and corporate franchise taxes to the Commonwealth, plus an annual regulatory fee to the Commission. Wheeling also operates large motor vehicles in Pennsylvania and pays the Pennsylvania Motor Carriers Road Tax imposed on fuel consumed by such vehicles.

3. The District Court Litigation

Wheeling declined to pay the Commission's bridge assessment and, on October 20, 1994, Wheeling filed suit in the United States District Court for the Western District of Pennsylvania seeking to enjoin the Commission, Scott Township and the individual Respondents from taking any further action to access, levy or collect the bridge assessment from Wheeling. Wheeling alleged that a levy for the cost of constructing and maintaining a public highway bridge constituted a discriminatory tax under § 11501(b)(4). Jurisdiction in the District Court was based on 49 U.S.C. § 11501(c) and 28 U.S.C. § 1331.

The District Court referred the case to a United States Magistrate for pre-trial proceedings in accordance with the Magistrate's Act, 28 U.S.C. § 636(b)(1)(A) and (B). Following discovery, the parties filed cross motions for summary judgment based on undisputed facts.

On September 3, 1996, the Magistrate Judge issued his initial Report and Recommendation recommending that Wheeling's motion for summary judgment be granted, and that

the motions for summary judgment filed by the Commission and Scott Township be denied. Based on undisputed facts, the Magistrate Judge concluded that the Commission's bridge assessment constituted a discriminatory tax in violation of § 11501, and recommended that defendants be permanently enjoined from further assessing or collecting any costs associated with the construction or maintenance of the highway bridge. The Magistrate also recommended that the District Court reject defendants' Tenth Amendment challenge to the constitutionality of § 11501 based on New York v. United States, 505 U.S. 144 (1992).

On October 11, 1996, the District Court adopted the Magistrate's Report and Recommendation in all respects and permanently enjoined Respondents from assessing or collecting from Wheeling any costs associated with the construction or maintenance of the bridge.

4. The Third Circuit Decision

The Commission and Scott Township filed their Notices of Appeal November 7, 1996, and October 31, 1996, respectively.

In a split decision, a majority of the Third Circuit Panel (Judges Nygaard and Mansmann) reversed the District Court below, and held that the assessment imposed on Wheeling by the Commonwealth for the purpose of constructing a public highway bridge was **not** a "tax" within the meaning of § 11501. In a dissenting opinion, Judge Garth concluded that the bridge assessment **was** a tax "because it is for the general benefit of

the public, and not for the narrow benefit of the railroad or to achieve some regulatory purpose." 141 F.3d at 105.

The Commission asserted in the Court of Appeals for the first time that the District Court lacked subject matter jurisdiction to enjoin the Commission in light of this Court's decision in Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996). The Majority rejected this defense, holding that § 11501 is a valid exercise of Congressional power under Section 5 of the 14th Amendment and effectively abrogates the Commission's 11th Amendment immunity.

The Dissent disagreed with the Majority's 14th Amendment analysis, but concluded that jurisdiction existed under *Ex Parte* Young, 209 U.S. 123 (1908), to enjoin the assessment or collection of future maintenance costs. The Dissent deferred for further consideration by the District Court whether jurisdiction would also exist to enjoin assessed, but unpaid,[1] bridge construction costs.

Wheeling filed a timely petition for a re-hearing and suggestion for re-hearing *en banc* on April 13, 1998, which was denied on April 15, 1999.

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[1]The bridge assessment remains unpaid as of the date of this Petition.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Congress has imposed a number of limitations on the states' power to tax. The question of whether a particular state assessment constitutes a "tax" is an important one, since the ultimate scope and efficacy of such federal legislation depends on how "tax" is defined.

Here, for example, Congress has specifically prohibited states from imposing discriminatory taxes on owners and users of rail transportation property. Congress' purpose in enacting § 11501 was to lift the burden of discriminatory state taxation from a major instrumentality of interstate commerce and to prevent a shift in the burden of state and local government to the railroad industry. Burlington Northern R.R. v. Oklahoma Tax Comm., 481 U.S. 454 (1987). Clearly, the Congressional policy underlying § 11501 may be easily thwarted if states are permitted to impose a discriminatory "tax" by denominating the levy as something else. *See, e.g.*, Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 13-14 (1983)(*held* that 49 U.S.C. § 1513(d), now 49 U.S.C. § 40116(d)(2)(A), prohibits discriminatory state tax measured by gross receipts, although tax is denominated a "property tax" by state legislature).

The importance of this issue is not limited to the railroad industry. Congress has seen fit to prohibit discriminatory state taxation of motor carriers, 49 U.S.C.

§ 14502, and air carriers, 49 U.S.C. § 40116(d)(2)(A); to grant exemptions from state taxation to specific entities, *e.g.*, 12 U.S.C. 2077(Production Credit Associations); 12 U.S.C.§ 2134 (Banks for Cooperatives); 49 U.S.C. § 2430 (k) and (l)(National Railroad Passenger Corporation); and to restrict state taxation of electrical energy producers and others. *See, e.g.*, Arizona Public Service Commission v. Snead, 441 U.S. 141 (1979)(*construing* 15 U.S.C. § 391). The continued efficacy of such federal statutory schemes depends on the definition of "tax" and on the interpretive principles which should guide a court in determining the nature of a particular state levy.

In deciding whether the Commission's bridge assessment is a "tax," the Majority below held that it "must consider the context in which the term 'tax' is raised and the Congressional policy underlying § 11501 to determine if it was a clear and manifest purpose of Congress to include such assessments within that provision." 141 F.3d at 95.

Although Congress' intentions are indisputably part of the analysis, the Majority infers from the **absence** of any specific discussion in the legislative history of bridge assessments that such assessments could not be "taxes" within the meaning of § 11501. 141 F.3d at 95-96. This approach is inconsistent with Burlington Northern R.R. v. Oklahoma Tax Comm., 481 U.S. 454 (1987), in which this Court held that, "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute 'must ordinarily be regarded as conclusive.'" 481 U.S. at 461. *See also*, Aloha Airlines, Inc., 464 U.S. at 12 ("[w]hen a statute unambiguously forbids the States to impose a particular kind of tax on an

industry affecting commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted."). Thus, the statutory term "tax" should have been given its ordinary meaning, and Pennsylvania's bridge assessment should have been analyzed in terms of its true purpose and economic effect. Aloha Airlines, Inc., 464 U.S. at 13-14; Western Airlines, Inc. v. Board of Equal., 480 U.S. 123, 130 (1987)(whether property tax on airline personalty was an "in lieu" tax within the meaning of 49 U.S.C. § 1513(d)).

In emphasizing the absence of any specific legislative history addressing bridge assessments, the Majority overlooked the fundamental Congressional purposes underlying § 11501, as reflected in the comprehensive language of § 11501(b)(1) through (b)(4) and the cases that have interpreted it. The Congressional policy underlying § 11501 is to prevent discriminatory state and local taxation against railroads in any form whatsoever, Alabama Great So. R.R. v. Eagerton, 663 F.2d 1036 1040-41 (11th Cir. 1981), and to curb the "temptation [on the part of state and local government] to excessively tax nonvoting, non-resident businesses in order to subsidize general welfare services for state residents." Western Airlines, Inc. v. Board of Equal., 480 U.S. 123, 131 (1987)(describing purpose of 49 U.S.C. § 11501, as model for 49 U.S.C. 1513(d)). **This** is the policy which should govern the interpretation of § 11501, not whether Congress specifically mentioned discriminatory bridge assessments in the legislative history of the Act, or whether the discriminatory practice was of long-standing.

The Majority cites Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994)("ACF") as an interpretative guide to the scope of § 11501(b)(4), but fails to recognize a critical limitation of this Court's holding in ACF which, if applied to the facts of this case, contradicts the Majority's narrow and restrictive construction of § 11501(b)(4).

In ACF, railcar companies complained that Oregon had violated § 11501(b)(4) by subjecting railcars to ad valorem tax while exempting certain other classes of business personal property from taxation. This Court held that states **could** subject railroad personal property to *ad valorem* tax without violating § 11501(b)(4), but expressly limited its holding to cases in which railroads and other commercial and industrial taxpayers were generally subject to the same scheme of taxation, *i.e.*, to a "generally applicable ad valorem property tax." This Court acknowledged that § 11501(b)(4) **would** prohibit a state from "singling out" railroads for discriminatory treatment:

> To begin with, this is not a case in which the railroads -- either alone or as part of some isolated and targeted group -- are the only commercial entities subject to an ad valorem property tax. *See* Burlington Northern R. Co. v. City of Superior, 932 F.2d 1185 (Ca. 7 1981)(occupation tax on owners and operators of "iron ore concentrates docks," in practical effect, applied only to docks owned by one particular rail carrier). If such a case were to arise , it might be incorrect to say that the state "exempted" the non-taxed property. Rather,

> one could say that the state had singled out railroad property for discriminatory treatment.

510 U.S. at 345-47; emphasis supplied.

This is precisely what has happened here. Railroads are indisputably "singled out" for discriminatory treatment. The Pennsylvania bridge assessment does not arise in the context of a generally applicable scheme of taxation. It is imposed solely on railroads whose rights-of-way are crossed by public highway bridges.[2]

Unlike the Majority in this case, this Court in ACF did not regard legislative history -- or the absence of it -- as particularly relevant or controlling. *See*, 510 U.S. at 345. This Court focused on the language and structure of § 11501, and considered Congresses' silence on the issue of property tax exemptions as relevant only "in light of the explicit prohibition

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[2]Wheeling is a small Class II railroad. The bridge assessment at issue constitutes a significant financial burden for Wheeling and, since the date of the Majority's decision, the Commission has seen fit to impose even greater burdens. On June 29, 1999, the Commission ordered Wheeling to bear the **full** cost of demolishing and removing an existing highway bridge crossing its right-of-way in Washington County, Pennsylvania, constructing a new bridge and the highway approaches thereto, and maintaining the bridge in perpetuity. Pa. PUC Docket No. I-00950042. Wheeling estimates that demolition and construction costs alone may exceed $500,000.

of tax rate and assessment ratio discrimination [contained in § 11501(b)(1) through (b)(3)]." 510 U.S. at 341.

The Majority's approach conflicts with long-standing decisions of this Court, such as the Head Money Cases, 112 U.S. 580 (1884)(*held*, federal levy to defray cost of regulating immigration is not a "tax"), which recognize that mere terminology is not dispositive of the nature of a particular levy, and that federal courts have the "duty of considering the real nature of the tax and its effect upon the federal right asserted." U. S. v. Allegheny County, 322 U.S. 174, 184 (1944)(*held*, county tax lien on machinery owned by United States is a "tax," notwithstanding the United States did not own land to which machinery was affixed). *See also,* Illinois Central Railroad Company v. City of Decatur, 147 U.S. 190 (1893)(*held*, special assessment against contiguous parcels for local road improvement is not a "tax" within the meaning of a federal land grant which provided an exemption from "all taxation"); U.S. v. LaFranca, 282 U.S. 568 (1931)(*held*, "tax" imposed on illegal sale of liquor at double the amount of tax imposed by preexisting law on a legal sale is a "penalty"); and Nat'l Cable Television Assoc., Inc. v. U.S., 415 U.S. 342 (1974)(case *remanded* to Federal Communications Commission with directions to calculate cable TV regulatory "fee" on a "value-to-recipient" basis, rather than on a "public benefit" basis, in order to avoid unconstitutional delegation to a federal agency of Congress' power to tax).

The Majority below did not properly consider "the real nature" of Pennsylvania's bridge assessment and "its effect on the federal right asserted," *viz*, on Wheeling's § 11501 right to non-discriminatory state taxation. The "real nature" of

Pennsylvania's bridge assessment is an enforced contribution from railroad companies to replace public funds that have been expended for the construction of a public highway bridge, a project which is indisputably of benefit to the general public.[3] Supervisors of Manheim Township, Lancaster County v. Workman, 350 Pa. 168, 38 A.2d 273 (1944)(construction and maintenance costs of public highways and bridges are general expenses of government).

The Majority asserts that the Commission's "bridge assessment does not contribute to the general fund of either the Township or the Commonwealth and is specific to a particular bridge at a particular crossing." 141 F.3d at 97. This statement is simply incorrect, and was shown to be incorrect in Wheeling's Petition for Rehearing.

Although bridge assessments are "specific" to a particular bridge, they plainly "contribute" to the general fund of both the Township and the Commonwealth. Any reimbursement by Wheeling of the Township's share of the bridge construction or maintenance costs would be applied to the Township's general fund, or to the Township's capital reserve fund, in the discretion of the Township's Board of

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[3]If federal funds had been involved in this bridge project, no part of the cost could have been assigned to the railroads. *See*, Federal-Aid Highway Act of 1956, 23 U.S.C. §§ 101, 130. Furthermore, federal regulations promulgated under the Federal-Aid Highway Act specifically declare highway crossing projects "to generally be of no ascertainable net benefit to the railroad." 23 C.F.R. 646.210.

Commissioners. Furthermore, the Commonwealth pays its share of bridge construction costs from its "Highway Bridge Improvement Restricted Account Within the Motor License Fund," a fund which receives revenues from state liquid fuels taxes and commercial vehicle registration fees, and which may be supplemented with revenues from the Commonwealth's General Fund. *See*, 75 Pa. CSA § 1901 *et seq*. (Highway Bridge Improvement Restricted Account Established); 72 Pa. CSA § 302.11 ("Motor License Fund" established); and 72 Pa. CSA § 3568 (Governor authorized transfer funds between Motor License Fund and General Fund).

The Majority's ruling leads to the anomalous result that Pennsylvania's bridge assessment is **not** a tax for purposes of § 11501, but **is** a tax for purposes of 45 U.S.C. §§ 546(b) and 581(c)(5) [now 49 U.S.C. § 2430(k) and (l)], statutes which exempted the National Railroad Passenger Corporation ("Amtrak") and certain commuter authorities such as Southeastern Pennsylvania Transportation Authority ("SEPTA") from state and local taxation. In National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission, 848 F.2d 436 (3rd Cir. 1988), the Third Circuit held that a Commission assessment against railroads for the costs of constructing and maintaining public highway bridges over railroad property -- precisely the same assessment at issue here -- constitutes a "tax" within the meaning of those statutes. Observing that Congress' intention in enacting § 546(b) was to require local jurisdictions who received passenger rail service to contribute to Amtrak's continued existence for tax relief, the Third Circuit held that it would be "manifestly inconsistent" with Congress' intention if the Commission's assessment were

not viewed as a state tax or fee proscribed by § 546(b). 848 F.2d at 440.

The Majority asserts that its decision is "consistent with the progeny of the Head Money Cases, 112 U.S. 580 (1884)," including Chicago & Northwestern Transportation Co. v. Webster County, 71 F.3d 265 (8th Cir. 1995), and Union Pacific R.R. Co. v. Public Utility Commission of Oregon, 899 F.2d 854 (9th Cir. 1990). This is not so, since the Head Money Cases, Chicago & Northwestern and Union Pacific all focus primarily on the purpose and true economic effect of the levy at issue, not on the absence of federal legislative history.

In the Head Money Cases, *supra*, this Court held that a federal levy was **not** a tax (and that Article I, Section 8 of the Constitution therefore had no application to the case), because the money raised "did not go to the general support of government," but was used instead solely to regulate immigration. 112 U.S. at 595, 596.

In Chicago & Northwestern, *supra*, a railroad challenged an Iowa assessment for the cost of a drainage culvert running beneath the railroad's right-of-way. Although the Eighth Circuit rejected the railroad's claim that Iowa's culvert assessment constituted a discriminatory tax under § 11501(d)(4), that court did so primarily because the assessment was imposed only for that portion of the project that kept the **railroad's** roadway intact, and the railroad was the only beneficiary of the culvert. 71 F.3d at 267. Although the Eighth Circuit noted nothing in the legislative history of § 306 which indicated "that Congress wanted to upset or undermine state drainage laws," the court focused primarily on the fact

that the Iowa levy did **not** raise "revenue from the railroad to expend for the general public benefit," but sought reimbursement for a project that benefited the railroad alone. 71 F.3d at 267.

In Union Pacific, *supra*, the Ninth Circuit held that a fee imposed on railroads by the Oregon Public Utility Commission to defray the cost of the Commission's regulatory duties was not a discriminatory "tax" within the meaning of § 11501(b)(4). In so holding, however, the Ninth Circuit focused primarily on the regulatory purposes of the Commission's levy, the rule of the Head Money Cases, *supra*, and the segregation of Oregon's general fund from its regulatory revenues. The Ninth Circuit stated:

> Since the Oregon assessment is limited by the cost of the regulatory program, and the revenues raised must be segregated from Oregon's general fund and used only to finance the program, there could be no fear the State would assess Union Pacific unfairly or for the purpose of raising general revenue in violation of the spirit of the 4-R Act.

899 F.2d at 858. That "fear" has been realized in Pennsylvania, where no portion of the bridge assessment is used for regulatory purposes but, rather, to pay for a public highway bridge which, in the absence of the railroad, would be paid for entirely by state and local government.

The Third Circuit's myopic view of the purpose of § 11501 is also irreconcilable with the expansive interpretation

of the Act applied by other federal circuits. Every federal Court of Appeals to have considered the issue has held that § 11501(b)(4) is a "catch all provision" designed to prevent states from discriminating against railroads by substituting another type of tax for a discriminatory property tax. Burlington Northern RR. v. City of Superior, Wisconsin, 932 F.2d 1185, 1186 (7th Cir. 1981)(Discriminatory "Ore Dock" tax); *see also,* Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation, 762 F.2d 375, 379 (4th Cir. 1985) (Franchise/excise tax held not discriminatory); Kansas City Southern Railway v. McNamara, 817 F.2d 368 (5th Cir. 1987)(Discriminatory Gross Receipts Tax); Alabama Great Southern R.R. v. Eagerton, 663 F.2d 1036 (11th Cir. 1981)(Discriminatory Gross Receipts Tax); Trailer Train Co. v. Bair, 765 F.2d 744 (8th Cir. 1985)(Discriminatory "Loaded Mile Tax"); Atchinson Topeka & Santa Fe R.R. v. State of Arizona, 78 F.3rd 438 (9th Cir. 1996)(Transaction Privilege Tax).

Thus, this case squarely presents the question of how "tax" should be interpreted where Congress has set limits on the states' power to tax, and what considerations should guide the federal courts in determining the nature of a state levy. Wheeling respectfully submits that the focus should be (as the Dissent recognizes) on the real purpose and economic effect of the levy, not on legislative history. Here, the Majority relied on the absence of any specific Congressional mention of bridge assessments to infer a restrictive interpretation of § 11501(b)(4), rather than focus on the plain language of § 11501(b)(4) and Congress' overarching purpose.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Gregory G. Fletcher
BAKER, DONELSON,
BEARMAN & CALDWELL
2000 First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-2000

Richard R. Wilson
1126 Eighth Avenue, Suite 403
Altoona, Pennsylvania 16602
(814) 944-5302

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed March 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-3703, 96-3704

WHEELING & LAKE ERIE RAILWAY COMPANY
v.
PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; David W. Rolka,
Chairman of the Pennsylvania Public Utility Commission; Joseph Rhodes, Jr.;
John M. Quain; Lisa Crutchfield; John Hanger, In their Official Capacities as
Members of the Pennsylvania Public Utility Commission; Scott Township,
Pennsylvania; James P. Mulligan, Chairman of the Board of Commissioners of
Scott Township, Pennsylvania
Scott Township, Pennsylvania and James P. Mulligan, Chairman of the Board of
Commissioners of Scott Township, Pennsylvania,
Appellants in 96-3703.
Public Utility Commission of the Commonwealth of Pennsylvania; David W.
Rolka, Joseph Rhodes, Jr.; John M. Quain, Lisa Crutchfield and John Hanger,
Appellants in 96-3704.

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App. 2

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS,
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civ. No. 94-01776

Argued Thursday, September 11, 1997.

Before: MANSMANN, NYGAARD and GARTH, Circuit Judge:

David A. Salapa (Argued)
Assistant Counsel
John F. Povilaitis
Chief Counsel
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265
Counsel for Appellants, Pennsylvania Public Utility Commission; David W. Rolka; Joseph Rhodes, Jr.; John M. Quain; Lisa Crutchfield; and John Hanger.

David L. Haber (Argued)
Weinheimer, Schadel & Haber
602 Law & Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219

Counsel for Appellants, Scott Township, Pennsylvania; and James Mulligan.

Gregory G. Fletcher (Argued)
Baker, Donelson, Bearman & Caldwell
2000 First Tennessee Building
165 Madison Avenue
Memphis, TN 38103

Richard R. Wilson
Vuono, Lavelle & Gray
2310 Grant Building
Pittsburgh, PA 15219
Counsel for Appellee

Charles D. Gray
National Association of Regulatory Utility Commissioners
1102 ICC Building
P. O. Box 684
Washington, DC 20044
Counsel for Amicus, National Association of Regulatory Utility Commissioners.

M GGF 468722.1
783767-002 07/09/99

Andrew S. Gordon
Chief Counsel
Gina M. D'Alfonso
Assistant Counsel in Charge
Commonwealth of Pennsylvania
Department of Transportation
Forum Place, 555 Walnut Street
Office of Chief Counsel, 9th Floor
Harrisburg, PA 17101-1900
Counsel for Amicus, Commonwealth of Pennsylvania
Department of Transportation.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

In this appeal we must decide whether assessing a railroad for a portion of the construction and maintenance costs of a bridge intersecting its right- of-way constitutes a discriminatory tax under the Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, 49 U.S.C. § 11501.[1]

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[1]The original complaint alleges a violation of 49 U.S.C. § 11503. That section was recodified pursuant to Pub.L. No. 104-88, § 102(a) (1996). We will refer to provisions of the 4-R Act at issue here by section number as currently codified in title 49, U.S.Code.

The district court held that the assessment was a discriminatory tax. We will reverse.

I. Background

The Wheeling & Lake Erie Railway Company subleases a railroad right-of-way passing under "Old Washington Pike" in Scott Township, Allegheny County, Pennsylvania. The bridge supporting that highway became so deteriorated that it was closed in 1982. The Township procured the necessary approvals from the Pennsylvania Public Utility Commission and constructed a new bridge at the Township's initial expense. The Commission then ordered Wheeling to pay 3% of the total construction costs of the bridge replacement project and 15% of the maintenance costs of the new bridge (excluding costs of snow and ice removal).[2] The Commission also assessed another railroad, whose tracks pass under the same span, 3% and 15% respectively. That railroad is not a party. The Pennsylvania Department of Transportation was to pay 7% of the construction costs. The Township was to pay the remaining

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[2]The Commission delegated this case to a Public Utility Commission Administrative Law Judge who issued a Recommended Decision. (J.A. at 226.) That decision included a proposed allocation of the construction and maintenance costs and also decided that Wheeling was not discriminated against on the basis of its railroad status. (J.A. at 245-50.) The Commission adopted the Recommended Decision in its September 23, 1994 Order. (J.A. at 266.)

87% of the construction costs and 70% of the maintenance costs, with an 80% reimbursement for construction costs coming from Pennsylvania's Billion Dollar Bridge Project Fund.

Wheeling filed this action requesting declaratory and injunctive relief from the construction and maintenance costs. It argued that the assessment was a discriminatory tax in violation of the 4-R Act. All parties filed motions for summary judgment. In its order granting Wheeling's motion, the district court declared that the assessment was an unlawfully discriminatory tax under the 4-R Act. The court also enjoined the defendants from assessing or collecting the construction and maintenance costs from Wheeling. The Commission and the Township appealed separately. We consolidated the appeals.

II. Eleventh Amendment Immunity

The Commission did not raise its Eleventh Amendment[3] argument before the district court. Nonetheless,

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[3]"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the Unites States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "T]he Eleventh Amendment [stands] for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63, 116 S.Ct. 1114, 1127, 134 L.Ed.2d 252 (1996). "[A] State can

Eleventh Amendment immunity can properly be raised for the first time on appeal. *See* Edelman v. Jordan, 415 U.S. 651, 658, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974) ("the Eleventh Amendment sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"); Bolden v. Southeastern Pa. Trans. Auth., 953 F.2d 807, 812 (3d Cir.1991).

The Eleventh Amendment bars suits against unconsenting states in federal courts. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 53-54, 116 S.Ct. 1114, 1122, 134 L.Ed.2d 252 (1996). There are two exceptions: Congress may abrogate a state's immunity, *id.*, and parties may sue state officers for prospective injunctive and declaratory relief. *See* Idaho v. Coeur d'Alene Tribe of Idaho, --- U.S. ----, ----, 117 S.Ct. 2028, 2034, 138 L.Ed.2d 438 (1997); Seminole, 517 U.S. at 72-74, 116 S.Ct. at 1132; *Ex parte* Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); Balgowan v. New Jersey, 115 F.3d 214, 217 (3d Cir.1997). Here, the parties do not dispute that the Pennsylvania Public Utility Commission is an arm of the Commonwealth of Pennsylvania protected by Eleventh Amendment principles of sovereign

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waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." Idaho v. Coeur d'Alene Tribe of Idaho, --- U.S. ----, ----, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997).

immunity.[4] Also, Pennsylvania has not given its consent to be sued in federal court.[5] The question remaining is whether any exceptions to immunity apply.

A. Congressional Abrogation of Immunity

A valid abrogation of Eleventh Amendment immunity requires Congress to "unequivocally express[ ] its intent to abrogate the immunity" and to act "pursuant to a valid exercise of power." Seminole, 517 U.S. at 55, 116 S.Ct. at 1123 (*quoting* Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)). Here, the parties agree that section 11501(c)[6] is an unmistakably clear expression of

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[4]In its reply brief, the Commission analyzed whether it is an arm of the state under the criteria this Court set forth in Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1144 (3d Cir.1995). The Commission concluded that they are indeed an arm of the state, and Wheeling does not take issue with that determination.

[5]The Commonwealth of Pennsylvania has codified its position on immunity as follows: "Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." 42 Pa. Cons.Stat. § 8521.

[6]Subsection (c) states in pertinent part as follows: "Notwithstanding section 1341 of title 28 and without regard

Congress's intent to abrogate states' immunity regarding violations of section 11501(b). However, the parties disagree on whether the statute is a valid exercise of congressional power.

49 U.S.C. § 11501(c).

The dispute centers largely around Seminole, which overruled Pennsylvania v. Union Gas Co., 491 U.S. 1, 23, 109 S.Ct. 2273, 2286, 105 L.Ed.2d 1 (1989) (*holding* that Congress could validly abrogate a state's sovereign immunity pursuant to its Commerce Clause powers). In Seminole, the Court noted that it had previously recognized only one other source of congressional power to abrogate states' sovereign immunity--the Fourteenth Amendment. Seminole, 517 U.S. at 58-60, 116 S.Ct. at 1125 (*citing* Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)). Thus, after Seminole, the only remaining source of congressional power to abrogate states' Eleventh Amendment immunity is the Fourteenth Amendment.

Congress promulgated the 4-R Act pursuant to its Commerce Clause powers because of the interstate nature of the railroad industry. Section 11501 announces Congress's concern that discriminatory taxation "unreasonably burden[s]

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to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section."

and discriminate[s] against interstate commerce." 49 U.S.C. § 11501(b); *see also,* 49 U.S.C. § 10101 (listing the purposes and policies of railroad regulation). However, when determining the sources of Congress's authority to legislate, we may look beyond the expressed constitutional basis in a statute's preamble or legislative history. *See* Fullilove v. Klutznick, 448 U.S. 448, 478, 100 S.Ct. 2758, 2774-75, 65 L.Ed.2d 902 (1980). The Supreme Court directs us to:

> "proceed to the consideration whether [§ 11501] is 'appropriate legislation' to enforce the Equal Protection Clause, that is ... whether [§ 11501] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'"

Katzenbach v. Morgan, 384 U.S. 641, 651, 86 S.Ct. 1717, 1724, 16 L.Ed.2d 828 (1966). In a later examination of Morgan, the Court established that to answer this inquiry:

> "[i]t was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment that application of literacy qualifications within the compass of § 4(e) would discriminate in terms of access to the ballot and consequently in terms of access to the provision of administration of government programs."

Fullilove, 448 U.S. at 477, 100 S.Ct. at 2774 (*citing* Morgan, 384 U.S. at 652-53, 86 S.Ct. at 1724-25).[7]

The legislative history of the statute before us shows "Congress was aware that the railroads 'are easy prey for State and local tax assessors'" in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.' "Department of Rev. of Or. v. ACF Indus., 510 U.S. 332, 336, 114 S.Ct. 843, 847, 127 L.Ed.2d 165 (1994) (*quoting* Western Air Lines, Inc. v. Board of Equalization, 480 U.S. 123, 131, 107 S.Ct. 1038, 1043, 94 L.Ed.2d 112 (1987) (*quoting* S.Rep. No. 91- 630, at 3 (1969))). Moreover, another court of appeals has held that the very purpose of section 11501 was to remedy discrimination against railroads:

> "Until this law was passed, as pointed out by the appellants, states could constitutionally classify railroads differently from all other taxpayers for the imposition of state taxes

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[7]Since Seminole, the District of Wyoming is the only other court to address this issue, specifically regarding the 4-R Act. *See* Union Pac. R.R. Co. v. Burton, 949 F.Supp. 1546 (D.Wyo.1996). We disagree with that court's analysis because it was restricted to the expressed purposes of the 4-R Act set forth in section 10101. *See id.* at 1554. We look beyond the general purposes of the 4-R Act as a whole, to what we perceive as the purpose underlying section 11501, the portion of the act implicated here.

> without violating the equal protection clause of the Fourteenth Amendment. It was the obvious purpose of Congress to put an end to this practice, where such treatment of the railroads as a class was discriminatory in effect."

Alabama Great S. R.R. Co. v. Eagerton, 663 F.2d 1036, 1040 (11th Cir.1981)(emphasis added). The Supreme Court has also said that "[c]orrectly viewed, § 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Morgan, 384 U.S. at 651, 86 S.Ct. at 1723-24.

It is evident to us that Congress recognized the potential for state and local taxing authorities to discriminate against railroads in violation of their Equal Protection rights under the Fourteenth Amendment. We conclude that Congress had the power, pursuant to Section Five of the Fourteenth Amendment, to promulgate section 11501, and did so to protect the railroads. Therefore, Congress validly abrogated Eleventh Amendment immunity, and the district court properly exercised jurisdiction over this lawsuit.

Neither our analysis nor our conclusion is affected by the recent decisions cited by the Commission. It cites Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir.1996), as employing the correct post-Seminole analysis for determining whether an act of Congress, generally regarded to be within its Commerce Clause powers, can also be justified by the

Fourteenth Amendment. The Commission reads Wilson-Jones to hold that, barring an explicit congressional recitation of authority under the Fourteenth Amendment, only statutes that remedy discrimination against a class of persons that Fourteenth Amendment jurisprudence has already identified as deserving special protection can be regarded as enactments to enforce the provisions of the Fourteenth Amendment.

We disagree with this narrow reading of Wilson-Jones. There, the Court found no evidence that the core provisions of the Fair Labor Standards Act, before being amended by the Equal Pay Act, were enacted pursuant to Section Five of the Fourteenth Amendment. Although the Court feared the implications of an expansive rule "that an act is valid [merely] if it is rationally related to achieving equal protection of the laws," it expressly admitted that its "opinion might be different if Congress made findings that a particular group needed legal protection to remedy some sort of invidious discrimination not directly addressed by federal precedent." Wilson-Jones, 99 F.3d at 209, 210 n. 4. Here, however, the remedial nature of section 11501's constitutional protection is evident, despite the lack of an explicit congressional statement. We believe that Congress was within its discretion when it found that railroads need special protection from local tax assessors. Therefore, we reach a different conclusion than the Court in Wilson-Jones.[8]

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[8]The reasoning in Wilson-Jones was also rejected in another Fair Labor Standards Act case. *See* Mills v. Maine, 118 F.3d 37, 45 (1st Cir.1997).

Nor is our result affected by City of Boerne v. Flores, --- U.S. ----, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), in which the Supreme Court declared the Religious Freedom Restoration Act unconstitutional. The Court found that the Act was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id.* at ----, 117 S.Ct. at 2170. In so holding, the Court reasoned that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning," it would be "difficult to conceive of a principle that would limit congressional power." *Id.* at ----, 117 S.Ct. at 2168. Here, section 11501 is not out of proportion to its objective, nor does it substantively change any constitutional protections.

We recently decided College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 131 F.3d 353 (3d Cir.1997), in which we held that the right to be free of false advertising is not a constitutionally protected intangible property right. Therefore, the Due Process Clause of the Fourteenth Amendment was not implicated, and we concluded that the Trademark Remedy Clarification Act of 1992 did not abrogate Florida's immunity because it did not further the purposes of the Fourteenth Amendment. College Savings Bank, however, was expressly limited to its facts, *id.* at 361-62, and did not concern the Equal Protection Clause. It does not contradict our decision. Similarly, there is no dissonance between our decision in In re Sacred Heart Hospital of Norristown, 133 F.3d 237 (3d Cir.1998), and our decision here. In Sacred Heart, we did not distinguish

between the Bankruptcy Clause and the Commerce Clause (both Article I powers) as being inappropriate sources of congressional power to abrogate states' Eleventh Amendment immunity. *Id.* at 242-43. Further, we found "no evidence suggesting that § 106(a) [of the Bankruptcy Code] was enacted pursuant to any constitutional provision other than Congress' Bankruptcy Clause power." *Id.* at 244. Here, however, we have found such evidence in section 11501's legislative history and judicially- recognized anti-discrimination purpose.

In sum, section 11501 is a valid exercise of congressional power under Section Five of the Fourteenth Amendment, thus effectively abrogating the Commission's

Eleventh Amendment immunity.[9] We now turn to the merits of the appeal.

III. The 4-R Act

Wheeling argues that the assessment of construction and maintenance costs violates section 11501 because it is an illegal tax that discriminates against railroads.[10] The district

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[9]The individual Commissioners also claim that they are immune from suit in federal court pursuant to the Eleventh Amendment. Wheeling contends that the Commissioners are within the second exception noted above: state officials can be sued for prospective injunctive and declaratory relief from constitutional violations. *See* Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); Balgowan v. New Jersey, 115 F.3d 214, 217 (3d Cir.1997); Laskaris v. Thornburgh, 661 F.2d 23, 26 (3d Cir.1981); *see also* Idaho v. Coeur d'Alene Tribe of Idaho, --- U.S. ----, ----, 117 S.Ct. 2028, 2034, 138 L.Ed.2d 438 (1997); Seminole, 517 U.S. 44, 72-74, 116 S.Ct. 1114, 1132, 134 L.Ed.2d 252 (1996). The parties dispute whether the declaratory or injunctive relief that Wheeling seeks is truly prospective. Because we have decided that the Commission is not immune, we need not reach this issue.

[10]"The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a state may not do any of them: ... Impose

court agreed, concluding that the assessments were "taxes" within the meaning of section 11501. Because this issue involves the interpretation of federal statutory law, our review is plenary. *See* In re TMI, 89 F.3d 1106, 1112 (3d Cir.1996). Unfortunately, the 4-R Act does not define "tax." We must, therefore, begin by determining the appropriate rule of construction.

In Department of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994), the Court held that nonrailroad property tax exemptions were not prohibited by subsection (b)(4).

> "When determining the breadth of a federal statute that impinges upon or pre- empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. We will interpret a statute to preempt the traditional state powers only if that result is 'the clear and manifest purpose of Congress.'"

Id. at 345, 114 S.Ct. at 850-51 (citations omitted).

We have decided two cases dealing with the statutory interpretation of "taxes" in a similar context. In National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission, 848 F.2d 436 (3d Cir.1988) [hereinafter Amtrak], the issue was whether "any taxes or other fees"

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another tax that discriminates against a rail carrier...." 49 U.S.C. § 11501(b)(4).

covered levies against Amtrak for building and maintaining the Cassatt Avenue bridge. *Id.* at 438 (*interpreting* 45 U.S.C. § 546b (*recodified* at 49 U.S.C. § 24301(l)). That decision outlined the declining history of intercity rail passenger service in America and Congress's efforts to revitalize it. *Id.* at 438. Congress rationalized Amtrak's exemption by theorizing that cities would gladly pay a user contribution to maintain rail passenger service. *Id.* In Amtrak, we reasoned, "[w]hether such 'special assessments' will be construed as 'taxes' depends on the context in which the terms are raised." *Id.* Additionally, we instructed that "the meaning of the word 'tax' is a matter of federal law deduced from congressional policy underlying the statute, rather than from state tax labels developed in an entirely unrelated legal context." *Id.* at 439. After noting that exemptions from taxation usually do not apply to such assessments, we adopted some general rules:

> "When a tax exemption is granted to certain private entities, the statutory language is construed closely because it affords a special privilege not available to others. Likewise, when a statute waives the federal government's freedom from local taxation, that language is also narrowly construed because it defeats the immunity shielding the federal government. In interpreting an exemption statute, the intention of the legislative body is pivotal."

Id. Amtrak, we concluded, was not an ordinary private firm; Congress intended it to be exempt from state and local taxes and fees to the same extent as the federal government. Thus, under a liberal reading of that statute, the bridge assessment

was within the meaning of the statutory phrase "taxes or other fees." *Id.* at 439-40.

Likewise, in Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission, 826 F.Supp. 1506 (E.D.Pa.1993) [hereinafter SEPTA], *aff'd* 27 F.3d 558 (3d Cir.1994) (unpublished table decision), the same issue arose under a different statute, which confers Amtrak's tax immunity upon certain commuter authorities. *See* 49 U.S.C. § 24501(g). The district court found that Congress intended the phrase "taxes or other fees" in section 24501(g) to have the same broad meaning as our Amtrak decision found Congress to have given to identical language in section 24301(l). *Id.* at 1525-26.

Amtrak and SEPTA involved the interpretation of statutes with different purposes and histories from the statute at issue here. Nonetheless, we believe the reasoning underlying those cases is instructive regarding the principles of statutory construction applicable here. The statutes in Amtrak and SEPTA were construed broadly because those entities had tax immunity comparable to that of the federal government. In contrast, we must interpret section 11501 strictly here, because Wheeling is a private entity benefitting from a special provision exempting it from discriminatory taxation. Thus, we must consider the context in which the term "tax" is raised and the congressional policy underlying section 11501 to determine if it was the clear and manifest purpose of Congress to include such assessments within that provision.

As the Commission, Scott Township, and the Department of Transportation all point out, there is nothing in the legislative history that sheds light on what Congress meant by the word "tax" in section 11501(b)(4). *See generally* Alabama Great S. R.R. Co. v. Eagerton, 663 F.2d 1036, 1041 (11th Cir.1981). Moreover, they maintain that because assessing railroads for such improvements was commonplace when the 4-R Act was enacted and Congress did not address that practice in either the Act or the legislative history, then Congress did not intend "tax" to include bridge assessments. This argument parallels the Supreme Court's reasoning in ACF regarding ad valorem tax exemptions:

> "It was common at the time [§ 11501] was drafted, as it is now, for States with generally applicable ad valorem property taxes to exempt various classes of commercial property.... Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, [§ 11501's] silence on the subject--in light of the explicit prohibition of tax rate and [tax] assessment ratio discrimination--reflects a determination to permit the States to leave their exemptions in place."

ACF, 510 U.S. at 344, 114 S.Ct. at 850.

Another court followed this reasoning in Chicago & North Western Transportation Co. v. Webster County, 71 F.3d 265 (8th Cir.1995). There, the County Board of Supervisors was expanding a drainage ditch running under a railroad's right-of-way. The County ordered the railroad to install a larger culvert under its tracks. When the railroad

refused, the County installed the culvert anyway, and assessed the cost against the railroad. The Court found that the culvert solely benefitted the railroad because it kept the railroad's right-of-way intact: the Supervisors could have legally bulldozed a wider ditch through the right-of-way, resulting in the same benefit to the public. The Court also noted that before the passage of the 4-R Act:

> "many states had statutes requiring railroads to construct improvements, including culverts, when drainage ditches crossed their rights-of-way....
> These statutes represent the juridical background against which Congress passed the 4-R Act, and nothing in either its language or its legislative history indicates that Congress wanted to upset or undermine state drainage laws. Congress did not express an intent to preempt the states' longstanding and common practice of charging railroads for certain drainage improvements, and we refuse to impute that intent into § [11501(b)(4)], given the historical environment in which it was enacted."

71 F.3d at 267-68. Here, the statutes giving the Commission the powers to order the construction and assess the costs of railroad crossing improvements date back to 1913. *See* 66 Pa. Cons.Stat. Ann. §§ 2702, 2704 (historical notes). Like the ad valorem tax exemptions in ACF and the culvert assessment in Chicago & North Western, assessing bridge improvement costs in Pennsylvania was a longstanding practice when Congress enacted the 4-R Act. Thus, we are convinced that

the congressional policy underlying section 11501 was not to treat bridge assessments as taxes. We conclude that it was not the clear and manifest purpose of Congress to include bridge assessments within the meaning of the word "tax" in section 11501(b)(4).

This conclusion is consistent with our comments in Amtrak that such assessments are usually not considered within exemptions from taxation. 848 F.2d at 439. There, we found support in an early Supreme Court case reaching a similar conclusion:

> "The charges here [costs of grading and paving a street] are not taxes proper, are not contributions to the state or to the city for the purpose of enabling either to carry on its general administration of affairs, but are charges only, and specially, for the cost for a local improvement supposed to have resulted in an enhancement of the value of the railroad company's property."

Illinois Cent. R. Co. v. Decatur, 147 U.S. 190, 208-209, 13 S.Ct. 293, 298, 37 L.Ed. 132 (1893) (*cited by* Amtrak, 848 F.2d at 439). Importantly, the amount assessed here does not raise revenue for the general fund of either the Township or the Commonwealth. (J.A. at 266-68)

Our conclusion is also consistent with the progeny of the Head Money Cases (Edye v. Robertson), 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884) (finding that a fifty-cent levy on ship owners for every immigrant passenger entering a U.S. port was not a tax because the money was used to

regulate immigration, not for the general support of the government). Following that precedent, the Courts of Appeals for the Eighth and Ninth Circuits have decided that assessing the costs of a new drainage culvert and the costs of railroad regulation, respectively, are not taxes within the meaning of section 11501. *See* Chicago & North Western, 71 F.3d at 265; Union Pac. R.R. Co. v. Public Util. Comm'n of Or., 899 F.2d 854 (9th Cir.1990). Those Courts reasoned that since the government levies at issue did not raise money for the general welfare, they were not taxes within the meaning of the respective statutes.

Wheeling's counter argument is that the assessment must be a tax because it partially relieves the state or township fisc of the cost of a bridge benefitting the public. This argument is not convincing. The bridge assessment does not contribute to the general fund of either the Township or the Commonwealth and is specific to a particular bridge at a particular crossing. Moreover, none of the levies in Chicago & North Western, Union Pacific, Head Money Cases, and Decatur were held to be taxes, even though they all arguably relieved burdens on the public fisc.

According to Wheeling, Chicago & North Western held that assessments are not taxes because the improvement benefitted that railroad alone. We disagree, and believe that the more logical reading is that to the extent a portion of the project benefitted that railroad, the cost of that portion should be assessed to that railroad. Here, the Commission determined that a new bridge would benefit both the railroad and the public and assessed the costs of construction and maintenance accordingly. The Commission's assessment

order adopting the Recommended Decision of the Administrative Law Judge stated: "Only after the Commission determines a particular party has a direct interest in or bears some responsibility for or obtains a discernible benefit from a specific crossing, does the Commission exercise its authority under state law to assess construction and maintenance responsibilities." (J.A. at 249, emphasis added.) Here, Wheeling directly benefits from the above-grade crossing of the Township's right-of-way because its trains are not impeded by any cross-traffic. This directly benefits Wheeling's safety and efficiency. Although the bridge benefits the general public, the peculiar benefit Wheeling receives from the construction and maintenance of the bridge reinforces our conclusion that the assessment is not a "tax" within the meaning of section 11501.

There is no need to overrule either Amtrak or SEPTA, as the Commission urges. Bridge assessments were intended to be included in the phrase "taxes or other fees" regarding the statutes applicable to those two cases, construed broadly, but not intended to be included in the word "tax" in section 11501, construed strictly. We find that the weight of authority supports our conclusion that Congress did not manifest a clear intent to include the assessment of bridge construction and maintenance costs, like those at issue here, within the meaning of "taxes" in section 11501. Without taxes, there was no discriminatory taxation. Therefore, the Commission and the Township did not violate 49 U.S.C. § 11501.

IV.

In sum, we hold that the district court erred by concluding that the assessments were discriminatory taxes, and for the reasons set forth above, we will reverse.

GARTH, J., dissenting:

I cannot agree with the majority of the panel which has reversed the district court's order of October 11, 1996, and has held: (1) that we have subject matter jurisdiction to decide Wheeling's claim against the Commonwealth; (2) that accordingly, we need not reach the issue of the Eleventh Amendment immunity of the individual Commissioners; and (3) that the assessment of construction and maintenance costs made against Wheeling is not a tax and does not discriminate against Wheeling in violation of 49 U.S.C.A. § 11501 *et seq.* (West 1997) ("the 4-R Act").

Because I believe that the majority has erred in its constitutional analysis as well as in the result which it reaches, I would affirm the district court's order.[1] In doing so, I would hold that under the doctrine of *Ex Parte* Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), all future maintenance costs can be enjoined. I leave to the court for future decision, however, the question as to whether relief is available for assessed, but unpaid, construction costs.

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[1]The issue of whether Eleventh Amendment sovereign immunity strips subject matter jurisdiction from the federal forum was not before the district court.

I have come to this conclusion because I find no Congressional power under the Fourteenth Amendment to abrogate the sovereign immunity of the Commonwealth of Pennsylvania. Hence, as to the Commonwealth, we have no jurisdiction to entertain Wheeling's challenge. However, as pertains to the individual Commissioners, their action in assessing Wheeling constitutes--under my analysis and the precedents I cite--a discriminatory tax.

Thus, I conclude that maintenance costs accruing in the future can be enjoined. I leave open for another day the question as to whether an unpaid assessment can be enjoined without violating the Eleventh Amendment.

I.

As the majority has explained, the Eleventh Amendment to the United States Constitution confers sovereign immunity upon the States. Without its explicit consent, a State cannot be sued in federal court unless Congress has abrogated its immunity. To abrogate the States' sovereign immunity, Congress must (1) unequivocally express its intent to abrogate that immunity, and (2) act pursuant to a valid exercise of power. Seminole Tribe v. Florida, 517 U.S. 44, 55-56, 116 S.Ct. 1114, 1123, 134 L.Ed.2d 252 (1996). At this point, I depart from the majority's analysis which upholds jurisdiction over the 4-R Act as enforcing the Equal Protection Clause because I cannot conclude that Congress could abrogate Pennsylvania's sovereign immunity by recourse to the Fourteenth Amendment.

I agree with the majority that the 4-R Act was enacted pursuant to Congress' commerce powers, and thus, after Seminole Tribe, abrogation of the States' sovereign immunity can no longer be upheld on that basis. *See* Majority Op. at 92. I further agree that we may venture beyond the expressed intent of Congress to determine whether the 4-R Act could have been enacted pursuant to some other valid exercise of Congressional power such that we may still retain jurisdiction over claims against the States. *See Id.* at 93. However, I conclude that there is no such power granted under the Constitution and hence I cannot agree that Congress could have validly enacted the 4-R Act pursuant to section five, the enforcement provision of the Equal Protection Clause of the Fourteenth Amendment.

The 4-R Act explicitly prohibits conduct by State and local authorities which "unreasonably burden[s] and discriminate[s] against interstate commerce...." 49 U.S.C.A. § 11501. The purpose of the 4-R Act was to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 457, 107 S.Ct. 1855, 1857-58, 95 L.Ed.2d 404 (1987). The policy behind the 4-R Act, memorialized at 49 U.S.C.A. § 10101 (West 1997), describes the commercial and economic objectives aimed at unburdening interstate commerce by strengthening the rail transport infrastructure of this country through competition and the free market. It is only with respect to the realization of these economic aims

which proscribe predatory pricing, that any mention is made of prohibiting discrimination.[2]

Unlike the majority, I cannot conclude that Congress can validly invoke its enforcement powers under section five of the Fourteenth Amendment merely because the word "discrimination" appears within the statutory text. The Congressional enforcement power under section five is not unlimited. *See* City of Boerne v. Flores, --- U.S. ----, ----, 117 S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1997).[3] Enactments legislated pursuant to Congress' section five enforcement power must be remedial in nature, designed to prevent constitutional infraction. *See id.*

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[2]Section 10101 states, in pertinent part:
In regulating the railroad industry, it is the policy of the United States Government-- (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination. 49 U.S.C.A. § 10101(12) (emphasis added).

[3]In Flores, the Supreme Court held that the Religious Freedom Restoration Act ("RFRA") was unconstitutional because its enactment exceeded Congress' enforcement power under section five of the Fourteenth Amendment. Instead of remedying or preventing constitutional infringements, the Court concluded that RFRA altered the meaning the Free Exercise Clause, thereby exceeding Congress' legitimate exercise of its section five power.

In Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir.1996), a pre- Flores case, the Sixth Circuit addressed whether acts legislated pursuant to Congress' commerce powers can be upheld as legitimately enforcing the Equal Protection Clause under section five of the Fourteenth Amendment after Seminole Tribe. The court concluded that legislation enforcing the Equal Protection Clause only extends to that "class of persons that Fourteenth Amendment jurisprudence has already identified as deserving special protection." *Id.* at 210. In light of Flores, the Sixth Circuit's holding in Wilson-Jones properly recognized that enactments construed as enforcing the Equal Protection clause must remedy or prevent constitutional infringements.

Similarly, in CSX Transportation v. Board of Public Works, 138 F.3d 537 (4th Cir.1998), a post-Flores opinion, the Fourth Circuit indicated that the district court held--as I would--that the 4-R Act could not be enacted under the section five power of the Fourteenth Amendment, as "the major purpose of the 4-R Act in general [is] to protect interstate commerce." *Id.* at 540[4]. Accordingly, the district court dismissed a challenge by two railroads for the assessment of illegally assessed taxes under the 4-R Act for lack of subject matter jurisdiction in light of Seminole Tribe.[5]

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[4]I have been unable to directly access the district court opinion, as it is unavailable on either Westlaw or Lexis.

[5]The Fourth Circuit reversed, however, on the basis that the district court had jurisdiction over State officials under the doctrine of *Ex Parte* Young. I discuss the Fourth Circuit's

By enacting the 4-R Act, Congress was not legislating to prevent unconstitutional behavior. There is no evidence that the discriminatory taxation which Congress intended to prohibit under the 4-R Act ever rose to the level of a constitutional violation such that the railroads were deprived of their right to equal protection. *See, e.g.*, Nashville Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254 (1940) (holding that higher tax burden placed upon railroad property did not violate the Equal Protection Clause). Without such evidence, we have no basis to conclude that Congress had the power to enact the 4-R Act pursuant to its enforcement power under the Fourteenth Amendment. *See* Flores, --- U.S. at ----, 117 S.Ct. at 2169.

Thus, although the court in Wilson-Jones opined in a footnote that its conclusion might differ had "Congress made findings that a particular group needed legal protection to remedy some sort of invidious discrimination not addressed by federal precedent," 99 F.3d at 210 n. 4, Congress has not made such findings in this case. Hence, the majority's rejection of Wilson-Jones despite its reliance upon this footnote is ill-founded as a justification to uphold jurisdiction over the 4-R Act. *See* Majority Op. at 93. Nowhere in the 4-R Act can a Congressional expression be found that the 4-R Act was passed "to secure the rights under the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 652, 86 S.Ct. 1717, 1724, 16 L.Ed.2d 828 (1966).

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opinion in CSX Transportation *infra* at 94 n.9, 97.

In fact, the majority implicitly concedes this point by reference to the following passage from Alabama Great Southern Railroad Company v. Eagerton, 663 F.2d 1036 (11th Cir.1981):

> Until this law was passed ... states could constitutionally classify railroads differently from all other taxpayers for the impositions of state taxes without violating the equal protection clause[sic] of the Fourteenth Amendment. It was the obvious purpose of Congress to put an end to this practice, where such treatment of the railroads as a class was discriminatory in effect.

Id. at 1040 (emphasis added); *see* Majority Op. at 93. Thus, the majority acknowledges that prior to the passage of the 4-R Act disparate classifications concerning railroads for taxation purposes were constitutional and did not violate the Equal Protection Clause. Indeed, this was well-settled law. *See* Browning, 310 U.S. at 369, 60 S.Ct. at 972 ("so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another ..."). Nevertheless, the majority now apparently characterizes such classifications as unconstitutional, sufficient to warrant congressional enactment of the 4-R Act under the Fourteenth Amendment Equal Protection Clause. From Flores, we learn that "Congress does not enforce a constitutional right by changing what the right is." --- U.S. at ----, 117 S.Ct. at 2164. Congress cannot make constitutional classifications unconstitutional, even though it can make such classifications unlawful. That is precisely what the 4-R Act did: it

prohibited long-standing constitutionally permissible discriminatory taxation practices. It did not--indeed, could not--make such discrimination unconstitutional.

Furthermore, the majority's analysis regarding the "findings" that Congress made that could support the enactment of the instant legislation under the section five power is both flawed and untenable. The legislative history and judicial recognition referencing discrimination cannot transform what was admittedly a constitutionally permissible classification into an impermissible one. That railroads were "easy prey" which were subjected to higher rates of taxation than other taxable entities does not lead to the inescapable conclusion that the discrimination that the railroads suffered--the disparate classification for taxation purposes--rose to unconstitutional proportions. The majority has not pointed to any evidence that could support the conclusion that the disparate taxation to which railroads were subjected constituted a violation under the Equal Protection Clause, and as I have mentioned above, Congress made no explicit findings, as Flores instructs must be done. See Flores, --- U.S. at ----, 117 S.Ct. at 2169. The mere fact that the railroads were permissibly discriminated against for taxation purposes is insufficient. Disparate tax classifications concerning railroads were long-standing:

> That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations

> may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate--these are among the commonplaces of taxation and of constitutional law.

Browning, 310 U.S. at 368, 60 S.Ct. at 972.

As no constitutional infraction has been shown, there is no issue to address concerning whether the section five enforcement power can be employed to abrogate the States' sovereign immunity. More importantly, as there is no constitutional violation to remedy, interpreting § 11501 as the majority has is out of proportion to its remedial objective. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." Flores, --- U.S. at ----, 117 S.Ct. at 2164. Quite simply, there can be no congruence between the injury sought to be prevented in this case and the sustaining of § 11501 under the Fourteenth Amendment section five enforcement power, because the injury involved in this case is simply not a constitutional injury.

Accordingly, after Seminole Tribe, and in the absence of any other legitimate constitutional grant of power, the Congressional intent to abrogate the States' sovereign immunity under the 4-R Act cannot be upheld as enacted

pursuant to a valid exercise of power.[6] *See also* Mills v. State of Maine, 118 F.3d 37 (1st Cir.1997) (rejecting section five of the Fourteenth Amendment as a means to retain federal jurisdiction over FLSA claim against the State in post-Seminole Tribe context).

In addition to Flores, other recent holdings from our court also support my position that the 4-R Act cannot be upheld as a valid enactment pursuant to the section five enforcement power. *See* In re: Sacred Heart Hosp., 133 F.3d 237 (3d Cir.1998);[7] College Sav. Bank v. Florida

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[6]This, of course, does not mean that the statute, itself, is unconstitutional. Rather, it simply means that federal courts are without jurisdiction to adjudicate such claims against the States because the Eleventh Amendment proscribes them.

[7]In Sacred Heart, we addressed the constitutionality of § 106(a) of the Bankruptcy Code, 11 U.S.C. § 106(a), which purports to abrogate state sovereign immunity in bankruptcy proceedings, in a post-Seminole Tribe context. As the Bankruptcy Clause is an Article I power, *see* U.S. Const. art. I, § 8, cl. 4, we held that it could not sustain an enactment abrogating a state's sovereign immunity after Seminole Tribe. In considering whether § 106(a) could have been properly enacted pursuant to section five of the Fourteenth Amendment, we held that there was no evidence to support such a construction. Accordingly, we concluded that § 106(a) was unconstitutional as it was not enacted pursuant to a legitimate exercise of Congressional power.

Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353 (3d Cir.1997).[8] While I acknowledge that these cases do not concern railroads or the 4-R Act, they form the crux of the analysis which must obtain where an act legislated pursuant to some other congressional power, such as the commerce clause, is examined for whether it can be upheld as a valid enactment under the section five power.

The majority finds no incompatibility between its holding and the holdings of the aforementioned cases largely because of the different subject matters involved and "section 11501's legislative history and judicially recognized anti-discrimination purpose." Majority Op. at 94. In each of those cases, however, and contrary to the conclusion which the majority reaches, the respective courts held that such legislation could not be validly enacted pursuant to the section five power. Furthermore, as I have indicated above, the discrimination referenced in § 11501's legislative history and

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[8]In College Savings Bank, we considered whether the district court properly dismissed a claim against the State of Florida brought under the Trademark Remedy Clarification Act of 1992 ("TRCA") for want of subject matter jurisdiction after Seminole Tribe. In affirming, we held that on the facts of that case jurisdiction could not be upheld pursuant to the section five power as a means to enforce the Due Process Clause of the Fourteenth Amendment as no protected property right was at issue.

by various courts does not, by itself, render the discrimination the 4-R Act intends to prevent unconstitutional discrimination subject to enforcement under the section five power of the Fourteenth Amendment. The majority's view of the test for validity under section five of the Fourteenth Amendment is so permissive, "it is difficult to conceive of a principle that would limit congressional power." Flores, --- U.S. at ----, 117 S.Ct. at 2168.

Thus, I cannot join the majority of this panel in holding that this court retains subject matter jurisdiction over Wheeling's 4-R Act claims against the Commission. Notwithstanding that conclusion, Wheeling's claim for prospective declaratory and injunctive relief still survives against the individual Commissioners under the doctrine of *Ex Parte* Young--a subject not addressed by the majority. *See* CSX Transp., Inc. v. Board of Public Works, 138 F.3d 537 (4th Cir.1998);[9] Majority Op. at 92 n.7.

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[9]Like the case before us, CSX Transportation v. Board of Public Works, 138 F.3d 537 (4th Cir.1998), involved a challenge by two railroads to a tax levied in violation of the 4-R Act. The district court dismissed the case for want of subject matter jurisdiction in light of Seminole Tribe, *see supra* at 90-91, but found no basis for jurisdiction over state officials under *Ex Parte* Young. While not addressing whether the 4-R Act could be properly enacted pursuant to the section five power of the Fourteenth Amendment, the Fourth Circuit reversed, holding that the members of the Board of Public Works could be enjoined from the collection of such illegal taxes under the doctrine of *Ex Parte* Young. Indeed, the Fourth Circuit

II.
A.

The district court held that the assessment levied against Wheeling for three (3) percent of the construction costs and for fifteen (15) percent of the future maintenance costs of the bridge constituted not only a tax under 49 § 11501(b)(4),[10] but a discriminatory tax. I discuss the discriminatory character of the tax in Section II(B), *infra*.

A tax "raises money, contribute[s] to a general fund, and [is] spent for the benefit of the entire community." San

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resolved the issue of improperly assessed taxes not yet paid--an issue which I have pointed out but have left open for this court to decide at a later time. *See infra* at 97. Hence, the analysis of the Fourth Circuit adopted in CSX Transportation coincides with my own in this case.

[10]Section 11501(b)(4) states:
(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
...
(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.
49 U.S.C.A. § 11501(b)(4) (West 1997).

Juan Cellular Tel. Co. v. Public Serv. Comm'n, 967 F.2d 683, 685 (1st Cir.1992). By contrast, a fee is imposed for regulatory purposes generally by an entity upon those who are subject to its regulation. When it is unclear whether an assessment is a tax or a fee, courts emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation. *Id.* (emphasis added). Support for this distinction between taxes and regulatory fees is found in the Head Money Cases, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884), and Union Pacific Railroad Company v. Public Utility Commission, 899 F.2d 854 (9th Cir.1990), another case brought under the 4-R Act.

In those cases, the courts reasoned that the assessments in question were used to finance the cost of the regulatory programs regulating the immigration and railroad industries, respectively. Therefore, the benefits from these regulatory programs did not inure to the public-at-large but only to the regulated industries. Accordingly, they did not constitute taxes.

Thus, the majority's reliance upon these cases as authority which would authorize the assessments made in the instant case is misplaced. Those cases do no more than hold that monies used for the benefit of the particular industry do not necessarily benefit the public in general, and thus cannot be deemed "taxes."

Here, considering the ultimate use of the monies assessed by the Commission, I can only conclude--as did the district court--that the assessments in question are a tax which benefits the general public which uses the bridge. Unlike a regulatory fee which would provide specific benefits to Wheeling, the revenue from the instant assessments was earmarked for a highway bridge that, once repaired, would provide a general benefit to the public at large.

It must be kept in mind that Wheeling's tracks are not laid upon the bridge in question. Rather, Wheeling's tracks run under the very bridge for which Wheeling has been assessed and for which it is required to pay future maintenance charges. Wheeling has been running its trains under the bridge throughout the duration of the period that the bridge has been closed.

In its amendment to the complaint before the Commission, Scott Township conceded that the construction and repair of the highway bridge was for the benefit of the general public, not the railroads. Scott Township alleged:

> (4)(d) That the present design of the "Crooked Bridge" is dangerous and not conducive to meeting the needs of the Township and travelling [sic] public in the area.
>
> ...
>
> (5)(e) That the bridge above [Wheeling] be replaced with one designed to meet the needs of the Township and travelling [sic] public.

Amend. to Compl. at 2-3 (emphasis added). These averments--made by Scott Township--are revealing. They disclose that the Township intended to repair the bridge (which as the record establishes, provides no benefit for Wheeling) not for the benefit of Wheeling but only for that of the general public.

The testimony of Patricia Wodnicki, the former manager/secretary of Scott Township, supports this fact as well. At her deposition, Wodnicki testified that the bridge for which the assessment was imposed upon Wheeling had been closed by 1982. *See* Dep. Patricia Wodnicki at 7 (Dec. 11, 1995).[11] Notwithstanding that the bridge had been closed by 1982, there is no contention that interference had been had with Wheeling's railroad operations or that Wheeling's operations had been interrupted or impacted upon as a result of the bridge's condition. In fact, the Commission's Administrative Law Judge found that:

> If the highway is permanently closed and the bridge demolished, [Wheeling's] operations will not be affected. The proposed improvement will not result in any changes to [Wheeling's] operations nor will it provide [Wheeling] with any additional revenues.

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[11]The Amendment to Complaint and excerpts from the deposition of Patricia Wodnicki were submitted to the court by a letter dated September 12, 1997, after oral argument, upon the request of the court.

Findings of Fact and Conclusions of Law (May 27, 1994). Furthermore, the repair of the bridge does not implicate any regulatory program regulating Wheeling's activities. Accordingly, because the assessment and maintenance charges benefit only the general public and not specifically Wheeling, I conclude that the assessment levied upon Wheeling constituted a tax.

I believe the majority's reasoning which relies upon National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission, 848 F.2d 436 (3d Cir.1988)("Amtrak"), and SEPTA v. Pennsylvania Public Utility Commission, 826 F.Supp. 1506 (E.D.Pa.1993) ("SEPTA"), *aff'd*, 27 F.3d 558 (3d Cir.1994) (unpublished table decision), to identify when an assessment is a tax, is flawed.[12] Those cases arise in a context different from the context of this appeal. Both cases involve a Congressional statute which exempted the railroad from any "taxes or other fees" imposed by any state. No definition of "taxes" or "fees" was furnished in either court's holding that a special assessment to pay for the construction and maintenance of identified bridges could not be charged against the railroads.

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[12]Significantly, two cases on which the majority relies and which I find inapposite held that under a Congressional exemption statute, railroads could not be assessed construction and maintenance costs. *See* National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 848 F.2d 436 (3d Cir.1988); SEPTA v. Pennsylvania Pub. Util. Comm'n, 826 F.Supp. 1506 (E.D.Pa.1993).

Thus, their analyses cannot assist us in distinguishing between a tax which should be borne by the general public and a regulatory fee properly imposed upon a carrier, because the statutory framework of those two cases exempted the railroad from both taxes and fees. I therefore read these cases and their discussions and holdings to be inapposite.

B.

Because the majority has held that Scott Township's assessment does not constitute a tax, it has not addressed the issue of whether the tax is discriminatory. To determine whether this tax discriminates against Wheeling under § 11501, we must compare the effect of the tax upon a certain "comparison class" of other taxpayers.

Our sister courts in Atchison, Topeka & Santa Fe Railway Company v. Arizona, 78 F.3d 438 (9th Cir.1996), and Kansas City Railway Company v. McNamara, 817 F.2d 368 (5th Cir.1987), have held that the comparison class to which a railroad such as Wheeling should be compared is that of "other commercial and industrial taxpayers." 78 F.3d at 441, 817 F.2d at 375. The Commission argues that because it has only limited jurisdiction to assess costs to a small group of entities that it would be inappropriate to compare its assessment on Wheeling to a class of all commercial and industrial taxpayers. Although we have yet to decide this issue, and as I have pointed out, the majority has not addressed it, I believe that the approach adopted by our sister courts in Atchison and Kansas City provides a logical and sensible rule of law.

If the comparison class were only those entities which were also taxed by the Commission, there would seldom, if ever, be any finding of discriminatory taxation. In Kansas City the court explained that

> [t]he only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden.

817 F.2d at 375.

Given that I would adopt as the comparison class the group of commercial and industrial taxpayers, I must conclude that the tax at issue against Wheeling is a discriminatory tax. None of the parties disputes that industrial and commercial taxpayers were not subjected to the tax assessment for the repair and reconstruction of the highway bridge. As a result, I would affirm the district court's ruling of discrimination as well.

III.

Wheeling seeks both declaratory and injunctive relief. As I would hold that after the Supreme Court decided Seminole Tribe, this court no longer has subject matter jurisdiction over the 4-R Act to hear cases involving the Commission, I am obliged to address the issue of whether the individual Commissioners may be sued under the doctrine of *Ex Parte* Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714

(1908). As I have noted, the majority has not dealt with this issue. *See supra* at 93.

The doctrine of *Ex Parte* Young permits suits against state officials acting in their official capacity--notwithstanding the States' immunity under the Eleventh Amendment--if the suit seeks prospective declaratory and/or injunctive relief. It does not allow suits for retrospective relief. *See* Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Wheeling has not yet paid the discriminatory taxes it was assessed regarding the construction of the bridge. Wheeling thus contends that it is seeking prospective relief because the assessment would have to be paid in the future. In addition, Wheeling asserts that because the future maintenance costs have not yet been assessed, the relief it requests is prospective in nature. By contrast, the Commissioners claim that the Commission's order assessing costs to Wheeling became final when Wheeling appealed the Commission's order. The Commissioners argue that if this court were to grant Wheeling relief, we would have to hold the Commission's order--a past act-- invalid, and that such would be contrary to Eleventh Amendment doctrine.

The issue of prospectivity is a difficult one. I have no problem holding that Wheeling is entitled to the prospective declaratory and injunctive relief concerning the future maintenance costs. Although the tax liability has already been determined, the Commissioners have not yet assessed those taxes. Accordingly, this court would merely be enjoining the

state actors from assessing future taxes, and that would fall comfortably within the *Ex Parte* Young doctrine.

With respect to the taxes assessed against Wheeling for the construction of the bridge, however, the prospectivity issue is less clear, and I am troubled by the Commission's claim that there is no remedy or relief available to Wheeling for the construction assessment made against it, despite Wheeling's consistent and continual challenge to that assessment as a discriminatory tax.

Since we have heard oral argument, the Fourth Circuit has directly addressed this issue in CSX Transportation, Inc. v. Board of Public Works, 138 F.3d 537 (4th Cir.1998). Upholding jurisdiction over state officials under the *Ex Parte* Young doctrine, the Fourth Circuit held that "[a]n injunction against the future collection of the illegal taxes, even those that already have been assessed, is prospective, and therefore available under the *Ex parte* Young [sic] doctrine." *Id.* at 541 (emphasis added). "The point is that the future collection [of the taxes] is illegal." *Id.* at 543. Thus, under CSX Transportation, it is within the power of the court to enjoin as prospective relief improperly assessed--though not yet paid--taxes.

As I am in dissent and my opinion on the issue of prospectivity is without precedential authority, I leave the resolution of this issue for another day. Nevertheless, I would be inclined to hold that Eleventh Amendment doctrine would permit relief where a mere assessment without payment of the charge has occurred--as it has here--and the Fourth Circuit has led the way by holding so in CSX Transportation.

IV.

In sum, I disagree with the majority's opinion in its entirety.

I would hold that this court is without subject matter jurisdiction to hear suits against the Commission after Seminole Tribe. Nonetheless, Wheeling would be entitled to prospective declaratory and injunctive relief under the doctrine of *Ex Parte* Young.

I would also hold that the assessment against Wheeling is a tax because it is for the general benefit of the public, and not for the narrow benefit of the railroad or to achieve some regulatory purpose.

I would further hold that the tax is discriminatory because the comparison class of commercial and industrial taxpayers was not assessed the tax for construction or future maintenance costs.

Finally, I would hold that Wheeling is entitled to prospective declaratory and injunctive relief from any assessment relating to the future maintenance costs of the bridge, although as I have indicated above, I do not decide at this time whether relief from the Commission's order levying the cost of construction of the bridge to Wheeling constitutes prospective or retrospective relief.

I therefore respectfully dissent from the majority's holdings.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WHEELING & LAKE ERIE RAILWAY COMPANY,	)
Plaintiff,	)
v.	)
PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; and JOHN HANGER, In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA; and JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,	)
Defendants.	)

No. 94-1776
JUDGE STANDISH

MAGISTRATE JUDGE BENSON

MEMORANDUM ORDER

On October 24, 1994, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on September 3, 1996, recommended that the motion for summary judgment filed by plaintiff (Docket #64) be granted; that the motions for summary judgment filed by defendants (Docket #59 and #61) be denied; and that an order issue enjoining collection of the assessment made by the Public Utility Commission against plaintiff. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on September 3, 1996. Objections were filed by defendants Pennsylvania Utility Commission, David W. Rolka, Joseph Rhodes, Jr., John M. Quain, Lisa Crutchfield, and John Hanger on September 13, 1996 (Docket #77), and objections were filed by defendants Scott Township, Pennsylvania and James P. Mulligan on September 17, 1996 (Docket #78). On October 7, 1996, plaintiff filed a response to defendants' objections (Docket #80). After *de novo* review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 11th day of October, 1996;

IT IS HEREBY ORDERED that the motion for summary judgment filed by plaintiff (Docket #64) is granted, and that the motions for summary judgment filed by defendants (Docket #59 and #61) are denied.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated September 3, 1996 (Docket #75), is adopted as the opinion of the court.

/s/ William L. Standish
WILLIAM L. STANDISH
UNITED STATES DISTRICT JUDGE

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

Richard R. Wilson, Esquire
Vuono, Lavelle & Gray
2310 Grant Building
Pittsburgh, PA 15219

Gregory G. Fletcher, Esquire
Baker, Donelson, Bearman,
& Caldwell
165 Madison Avenue
2000 First Tennessee Building
Memphis, TN 38103

David A. Salapa, Esquire
Assistant Counsel
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

David L. Haber, Esquire
Weinheimer, Schadel & Haber, P.C.
806 Law and Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WHEELING & LAKE ERIE RAILWAY COMPANY,	)
Plaintiff,	)
v.	)
PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; and JOHN HANGER, In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA; and JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,	)
Defendants.	)

Civil Action No. 94-1776
JUDGE STANDISH

MAGISTRATE JUDGE BENSON

ORDER

AND NOW, this 11th day of October, 1996;

IT IS HEREBY DECLARED that the assessment, levy or collection by the defendants of construction costs or maintenance fees associated with the Old Washington Pike bridge against plaintiff is a discriminatory tax which violates Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503.

IT IS HEREBY ORDERED that defendants are permanently enjoined from assessing against or collecting from plaintiff any costs associated with the construction or maintenance of the Old Washington Pike Bridge under 66 Pa.C.S. § 2704(a).

/s/ William L. Standish
WILLIAM L. STANDISH
UNITED STATES DISTRICT JUDGE

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

Richard R. Wilson, Esquire
Vuono, Lavelle & Gray
2310 Grant Building
Pittsburgh, PA 15219

Gregory G. Fletcher, Esquire
Baker, Donelson, Bearman,
& Caldwell
165 Madison Avenue
2000 First Tennessee Building
Memphis, TN 38103

David A. Salapa, Esquire
Assistant Counsel
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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Weinheimer, Schadel & Haber, P.C.
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IN THE UNITED STATES DISTRICT COURT
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WHEELING & LAKE ERIE RAILWAY COMPANY,	)
Plaintiff,	)
v.	)
PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; and JOHN HANGER, In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA; and JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,	)
Defendants.	)

Civil Action No. 94-1776
JUDGE STANDISH

MAGISTRATE JUDGE BENSON

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

1. RECOMMENDATION

It is respectfully recommended that the motion for summary judgment filed by plaintiff (Docket #64) be granted; that the motions for summary judgment filed by defendants (Docket #59 and #61) be denied; and that an order issue enjoining collection of the assessment made by the Public Utility Commission against plaintiff.

2. REPORT

This is an action filed by a railroad seeking declaratory relief under Section 306 of the Railroad Revitalization and Regulation Reform Act of 1976 (4-R Act), 49 U.S.C. § 11503, captioned "Tax Discrimination Against Rail Transportation Property." Plaintiff is an interstate rail carrier within the jurisdiction of the Interstate Commerce Commission. At issue are assessments against plaintiff levied by defendant Public Utility Commission of the Commonwealth of Pennsylvania (Commission) for the construction and future maintenance of a public highway bridge over plaintiff's tracks located in Scott Township, Pennsylvania. Plaintiff asserts that the assessment is, in fact, a discriminatory tax forbidden by Section 306. Defendants counter that the assessment is not a "tax," but is in the nature of a regulatory fee and, hence, not proscribed by Section 306. The parties have filed cross-motions for summary judgment (Docket #59, #61, #64), as well as briefs, exhibits

and affidavits in support thereof (Docket #60, #63, #65, #66, #67). The parties have also filed briefs in opposition to the other parties' motions, and replies to briefs in opposition (Docket #68, #69, #70, #71, #72, #73). The motions are ripe for disposition.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if, drawing all interferences in favor of the non-moving party, " . . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth " . . . specific facts showing that there is a genuine issue for trial . . . " or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Stated another way, "[w]here the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"

Matsushita at 587. The inquiry, then, involves determining "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brown v. Grabowski, 922 F.2d 1097, 1111 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991), *quoting* Anderson, *supra*, at 251-52. If a court, having reviewed the evidence with this standard in mind, concludes that "the evidence is merely colorable . . . or is not significantly probative," then summary judgment may be granted. Anderson, at 249-50.

UNDISPUTED FACTS

On September 23, 1994, the Commission entered an order allocating costs of construction and assigning maintenance responsibility for a highway bridge carrying Old Washington Pike over plaintiff's tracks located in Scott Township, Pennsylvania.[1] Pursuant to this order, plaintiff was directed to

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[1] The Commissions's authority for this allocation is derived from Pennsylvania statues located at 66 Pa.C.S. § 2702 and § 274. The former provision is entitled "Construction, relocation, suspension and abolition of crossings." The latter provision is entitled "Compensation for damages occasioned by construction, relocation or abolition of crossings," and provides in relevant part that

> "the cost of construction, relocation,

pay Scott Township 3% of the total construction costs incurred

---

> alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities or municipal corporations concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine . . . ." 66 Pa.C.S. § 2704.

A railway company is considered a "utility" for purposes of this section. See, e.g., Pittsburgh and Lake Erie Railway Company v. Pennsylvania Public Utility Commission, 124 Pa. Cmwlth. 611, 556 A.2d 944 (1989) (Commission could impose responsibility for maintaining pier of bridge over railway's property on railway).

in rebuilding the bridge. The Commission also allocated 3% of the construction costs to Conrail, 7% of the costs to the Pennsylvania Department of Transportation, and 87% to Scott Township. The Commission allocated 15% of the cost for future maintenance of the bridge (exclusive of ice or snow removal) to plaintiff. The remaining maintenance costs were allocated 15% to Conrail, and 70% to Scott Township. Plaintiff estimates that its allocated portion of the construction costs will total approximately $75,000, and has no estimate of what the maintenance costs will be in the future.

ANALYSIS

In response to the decline of the railroads in this country, Congress, in 1976, enacted Section 306 to lift the often "heavy hand of state and local taxation" from railroads. *See*, Clinchfield R.R. v. Lynch, 700 F.2d 126, 128 n.1 (4th Cir. 1983); Ogilvie v. State Board of Equalization, 657 F.2d 204,

206-208 (8th Cir. 1981).[2] The entire text of Section 306(b) reads as follows:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to

---

[2] Judge Posner explains the plight of the railroads in this fashion:

> Railroads have long been attractive targets for state and local taxing authorities: so many railroad assets are at once specialized to railroading and physically immobile that it is very difficult for railroads to escape heavy taxation by transferring the assets to another industry or location; in other words, the 'exit' option for limiting political exploitation is denied them.

Burlington Northern v. City of Superior, Wisconsin, 932 F.2d 1185, 1186 (7th Cir. 1991)

the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

49 U.S.C. § 11503(b) (104). The first three subparagraphs deal with the assessment of the value of real property owned by railroads, and the rate of real property taxes collected from railroads. Here, there is no tax on real property at issue, nor is

the assessed value of real property involved.[3] Rather, plaintiff relies upon subsection b(4), which "is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax" for a discriminatory property tax. Burlington Northern, *supra*, 932 F.2d at 1186. This subsection is violated whenever a state practice "imposes a proportionately heavier tax on railroading than on other activities, even if the taxing authority might be able to show that the activity imposes a disproportionate burden on public services." *Id.* at 1187.

Not all amounts which a state seeks to recover from a railroad are "taxes" for purposes of Section 306(b)(4). In this respect, defendants argued in a motion to dismiss earlier denied by this court that they are, in fact, not taxing plaintiff for the construction and maintenance of the bridge, but are, instead, collecting the equivalent of a fee for regulation of the railroad. The distinction which defendants sought to apply was explained in Union Pacific Railroad Company v. Public Utility Commission, 899 F.2d 854 (9th Cir. 1990). In that case, Oregon's Public Utility Commission assessed a levy against

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[3] To avoid any confusion, from this point on the term "assessment" refers only to the amount that the Commission has determined should be paid by plaintiff for the bridge construction and maintenance. This "assessment" should not be confused with the process of assessing the value of real property, an issue addressed in § 11503(b)(1-3), but which is not at issue in this case.

railroads to collect their proportionate share of the costs incurred by the Commission in performing its regulatory duties with respect to railroads. Specifically, the Oregon Commission regulates safety at railroad crossings, the working environment of railroad employees, regulates the transportation of hazardous materials, enforces the Federal Rail Safety Program standards and administers a program to assure adequate rail services to Oregon rail users. The Union Pacific court found that the levy in question was not a "tax" since it "is designed to recoup the costs of a regulatory program from members of the industry regulated, rather than to raise general revenues (footnote omitted)." *Id.* at 859. The court in Union Pacific found particularly compelling the fact that the practice complained of had been in force for some time before enactment of Section 306, but that such levies were not mentioned in the legislative history of Act. *Id.* at 857. Hence, the court concluded that the levy, limited as it was to the cost of regulating certain railroad activities, was not addressed by Section 306, since the levy posed no danger that "the State would assess Union Pacific unfairly or for the purpose of raising general revenue in violation of the spirit of the 4-R Act." *Id.* at 858.

The court has already ruled that Union Pacific is unavailing to defendants in this case. The assessment in this case is clearly not meant to pay the costs of the Commission's operations, nor does it purport to pay the costs of any regulatory body. Therefore, the assessment cannot be termed a "fee" which would be exempted from the scope of Section 306 under the rationale of Union Pacific. Rather, the assessment is directly payable to a political subdivision of the state, Scott Township, to defray the cost of construction and

maintenance of a public project, specifically a highway bridge. To use another distinction relied upon by the Union Pacific, the assessment in this case does not serve in any fashion to "regulate activities" of the railroad, but serves, instead, to raise revenues for Scott Township for the purpose of funding the construction and maintenance of a public project. *Id.* at 859.

The court has also rejected defendants' attempt to rely upon SEPTA v. Public Utility Commission, 140 Pa. Cmwlth. Ct. 270, 592 A.2d 797 (1991), *allocatur denied*, 611 A.2d 714 (1992). In that case, the court was analyzing the effect of an exemption from local taxes and fees granted to Amtrack under 45 U.S.C. § 546(b), and extended to SEPTA pursuant to § 581(c)(5) "to the same extent as" Amtrack. The Commonwealth Court of Pennsylvania found that the Commissions's imposition of costs for a bridge over a rail line was not a "tax" for purposes of 45 U.S.C. § 581(c)(5). Commonwealth Court so held even though the Court of Appeals for the third Circuit in National Railroad Passenger Corp. v. Pa. Public Utilities Commission, 848 F.2d 436 (3d Cir. 1988), had found that §546b exempts Amtrack from all local taxes and fees, including those to fund local improvements in the nature of a bridge over the rail line. Commonwealth Court distinguished its case on the basis that SEPTA is not a federal instrumentality as is Amtrack, and that the exemption available under §546b. In SEPTA v. Pennsylvania Public Utility Commission, 826 F.Supp. 1506 (E.D. Pa. 1993), *aff'd* 27 F.3d 558 (1994), however, the Eastern district court held, to the contrary, that § 581(c)(5) does exempt SEPTA from maintenance fees for bridges to the same extent as Amtrack is exempt under § 546(b). Commonwealth Court's conclusion, then, has been soundly rejected. *See also*, SEPTA v.

Pennsylvania Public Utility Commission, 802 F.Supp. 1273 (E.D. Pa. 1982) (same).

Defendants now seek summary judgment and rely principally on Chicago & Northern Western Transportation Co. v. Webster County, 71 F.3d 265 (8th Cir. 1995), for the proposition that the action taken by Scott Township and the PUC was not a "tax" as contemplated under the 4-R Act. In that case, Webster County decided to enlarge a drainage ditch which was crossed at some point by a railroad right-of-way. Webster County ordered the railroad to install a new culvert in the area of the ditch within the right-of-way and, when the railroad refused, installed a new culvert and billed the railroad as it is entitled to do under state law. In affirming the district court's holding that this assessment was not a tax, the court made the following statement:

> Given the facts of this case, we agree with the district court that the board is not using Iowa drainage laws to tax the railroad. The board is not raising revenue from the railroad to expend for the general public benefit; it simply wants reimbursement for building a culvert that benefits the railroad alone.
>
> We reject the railroad's contention that the board is using the drainage laws to finance a project that benefits all of the residents in the drainage district. It is true that the general public will benefit from the board's efforts to improve drainage. It is also true that the improvement project requires widening the ditch through the right-of-way. The board, however,

> does not seek to recover the cost of widening the ditch, and if the board had demanded that the railroad expand the ditch, we would face an entirely differently difficulty. Here the board seeks reimbursement only for that portion of the project which keeps the railroad's roadway intact.
>
> The same improvement in drainage, with the same benefit to the public, would have resulted if the board had bulldozed a ditch through the right-of-way instead of installing a culvert. The board could have, without compensating the railroad, been authorized to do just that, because it is well settled that railroads are not entitled to compensation for damage to their roadbeds caused by the installation of drainage improvements. [citations omitted].

Id. at 267. Here the very situation which was described in Webster hypothetically has occurred in fact. Plaintiff is not being asked to fund an improvement which will benefit only plaintiff. Rather, plaintiff is being singled out for contribution to a public project which benefits all residents of Scott Township and, in fact, all users of the public roadway. It will be seen how similar is this to the hypothetical posed in Webster, *i.e.*, "if the board has demanded that the railroad expand the ditch." Plaintiff has not been asked to pay for an improvement which benefits the plaintiff alone. Not only is Webster unpersuasive authority for defendants, but it in fact supports plaintiff's position that the assessment in this case is a tax for purposes of Section 306.

There is also a dispute in this case concerning whether the tax imposed on the railway is discriminatory. The only entities subject to the tax in question are railroads and public utilities. And here, no assessment was in fact made against any public utility. Further, the proper comparison classes for purposes of the issue of discrimination are either "competing transportation modes" or the broader class of "commercial and industrial taxpayers." *See, e.g.*, National R.R. Passenger Corp. v. State Board of Equalization, 652 F.Supp. 923 (N.D. Cal. 1986); Burlington Northern R.R. v. Triplett, 682 F.Supp. 443 (D. Minn. 1988); Atchison, Topeka and Santa Fe Railway v. Bair, 338 N.W.2d 338 (Iowa 1983). In Atchison, Topeka and Santa Fe Railway v. State of Arizona, 78 F.3d 438 (9th Cir. 1996), the Ninth Circuit Court addressed transaction privilege and use taxes which were assessed against a railroad. The railroad claimed that these taxes were discriminatory because, inter alia, motor carriers were exempted from them. And the district court found that the taxes were indeed discriminatory for that reason: the railroad's competitors, motor carriers, were not subject to the same tax. The court held, however, that the comparison class should be **all** commercial and industrial taxpayers who are also subject to the same tax, since the taxes in question "are generally applicable taxes," that at least 140,000 businesses were subject to the transaction privilege tax, and that all businesses were subject to the use tax. *Id.* at 443.

Defendants, relying upon Atchison, thus assert that the proper focus of the court's discrimination analysis ought to be the other entities which are subject to the tax in question, and whether or not plaintiff is being treated fairly in comparison with those entities. I think the defendants misunderstand the

important of the Atchison decision. In Atchison, the court quoted with approval from Kansas City S.Rv. v. McNamara, 817 F.2d 368, 375 (5th Cir. 1987), as follows:

> The only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large group of taxpayers .... We think the best course is to require that the railroads be taxes only under taxes applicable to 'other commercial and industrial' taxpayers.

Thus, the question is not limited merely to the other entities which are subject to the tax in question (unless that tax is applicable generally to other commercial and industrial taxpayers). Here, the tax is applicable only to railroads and, if the Commission believes it appropriate, to public utilities. This is not the type of "generally applicable" tax which was present in Atchison, and does not give the proper base for comparison. Instead the fact that the tax is applicable to only railroads and public utilities conclusively establishes, in the court's view, that it is discriminatory when considered in light of the class of other commercial and industrial taxpayers, who are not subject to such a tax. In short, the evidence of record supports only one conclusion, and that is that the tax in question discriminates against railroads in comparison to the greater class of commercial and industrial taxpayer who are not subject to the tax.[4] Plaintiff is entitled to summary judgment in the

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[4] The same conclusion must also be reached if the comparison class is limited to competitors, i.e., motor carriers, who are likewise not subject

nature of an injunction against collection of the tax in this matter.

CONSTITUTIONALITY OF § 306

The PUC also asserts that, if the assessment in question is one that is prohibited by § 306 of the Act, then that portion of the Act is unconstitutional. The PUC asserts that, as applied in this case, § 306 would violate the Tenth Amendment since it would compel the Commission to regulate rail highway crossings pursuant to federal direction and without federal preemption. The PUC relies upon the decision in New York v. United States, 505 U.S. 144 (1992). In that case, the Court was concerned with the Low-Level Radioactive Waste Policy Amendments Act of 1985 with required states, as an alternative to federal regulation, to accept ownership of low-level radioactive waste generated within its borders and to be liable for all damages suffered by waste generators as a result of a failure to take title promptly. The Court found these provisions unconstitutional under the Tenth Amendment since it required the state to enact and enforce a federal regulatory program. This, the Court held, gave the States at issue a "choice" between two alternatives that Congress was not empowered to impose upon the States. Specifically, the states were being compelled to enforce a federal regulatory subsidy to waste producers, or were being forced to take title to the waste. The Court ended its analysis as follows:

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to the tax.

> The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

Id. at 177.

In this case, there is no infringement upon the core function of the state in regulating its roadways. The manner of repairs or regulation of roadways has not been impacted at all by the Act. Instead, the manner of state taxation of an entity engaged in interstate commerce is at issue here. All that the Act prohibits is the discriminatory taxation of railroads, regardless of the purpose of that taxation. The state is not, in fact, prevented from imposing a tax upon railroads which helps fund roadway improvements like those involved in this case. The only limitation imposed by Congress is that a state may not impose such a tax only on railroads, or in a fashion which discriminates against railroads. The Act is not constitutional. See, State of Tennessee v. Louisville & Nashville R.R, 478 F.Supp. 199 (M.D. Tenn. 1979), *aff'd*, 652 F.2d 59 (6th Cir. 1980), *cert. denied*, 454 U.S. (1981) (*rejecting* 10th Amendment challenge to § 306); State of Arizona v. Atchison, Topeka and Santa Fe R.R., 656 F.2d 398 (9th Cir. 1981) (same).

CLAIM PRECLUSION

Defendant Scott Township also asserts that the issue of § 306 discrimination was raised and litigated before the PUC's Administrative Law Judge and, therefore, this court should not reach the issue. In another case which dealt with the Amtrack exemption under 45 U.S.C. § 456(b), National R.R. Passenger Corp. v. Commonwealth of Pennsylvania PUC, 665 F.Supp. 402 (E.D. Pa. 1987), the court found that the PUC's administrative proceedings did not comprise a "court of competent jurisdiction" to determine whether federal law prevented Amtrack from being assessed bridge construction and maintenance fees. The Eastern district court noted that the PUC is limited to a determination of whether the apportionment was "just and reasonable." *Id.* at 408. That scope of review did not, explicitly or implicitly, give the PUC the authority or the expertise to determine whether the assessment comported with federal law. Likewise, in this case, the PUC has no authority under state law to interpret federal limitations on the taxation of railroads. Further, even if the PUC did have such authority, because it is the very taxing authority whose actions are being reviewed, it would not be appropriate to defer to that entity's decision on the applicability of federal law. *See, e.g.*, Union Pacific R.R. v. Oregon Department of Rev., 920 F.2d 581, 585 (9th Cir. 1990) (federal deference to state expertise not warranted in § 306 cases).

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion for summary judgment filed by plaintiff (Docket #64) be granted. It is further recommended that the motions for summary judgment filed by defendants (Docket #59 and #61) be denied. Finally, it is recommended that an order issue, in substantially the same form as the proposed order attached hereto, enjoining collection of the assessment in this matter.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/ Kenneth J. Benson
KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: September 3, 1996

cc: Richard R. Wilson, Esquire
Vuono, Lavelle & Gray
2310 Grant Building
Pittsburgh, PA 15219

Gregory G. Fletcher, Esquire
Baker, Donelson, Bearman &
Caldwell
165 Madison Avenue
2000 First Tennessee Building
Memphis, TN 38103

David A. Salapa, Esquire
Assistant Counsel
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

David L. Haber, Esquire
Weinheimer, Schadel & Haber, P.C.
806 Law and Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219

Richard A. Ferris, Esquire
1106 Fifth Avenue
Pittsburgh, PA 15219

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3703

WHEELING & LAKE ERIE RAILWAY COMPANY

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, Chairman of the Pennsylvania Public Utility Commission; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; JOHN HANGER; In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA, JAMES P. MULLIGAN, Chairman of the Board of Commissioners of Scott Township, Pennsylvania

SCOTT TOWNSHIP, PENNSYLVANIA
And JAMES P. MULLIGAN, Chairman of the Board of Commissioners of Scott Township, Pennsylvania,

Appellants

No. 96-3704

WHEELING & LAKE ERIE RAILWAY COMPANY

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, Chairman of the Pennsylvania Public Utility Commission; JOSEPH RHODES, JR.; JOHN M. QUAIN; LISA CRUTCHFIELD; JOHN HANGER; In Their Official Capacities as Members of the Pennsylvania Public Utility Commission; SCOTT TOWNSHIP, PENNSYLVANIA, JAMES P. MULLIGAN, Chairman of the Board of Commissioners of Scott Township, Pennsylvania

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, JOSEPH RHODES, JR.; JOHN M. QUAIN, LISA CRUTCHFIELD and JOHN HANGER,

Appellants

On appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 94-cv-01776)
Hon. William L. Standish, District Judge

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge,
SLOVITER, STAPLETON, MANSMANN,
GREENBERG, SCIRICA, NYGAARD, ALITO,
ROTH, LEWIS, MCKEE and RENDELL, Circuit Judges

The petition for rehearing filed by the Appellee, Wheeling & Lake Erie Railway Corporation, in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby **DENIED**.

By the Court,

/s/
United States Circuit Judge

DATED: April 15, 1999

Section 306 of the
Railroad Revitalization and Regulatory Reform Act of 1976
Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

I. Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(1) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for the purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(2) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(3) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(4) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

ii. Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent restrain, or terminate any acts in violation of this section, except that--

(1) such jurisdiction shall not be exclusive or the jurisdiction which any Federal or State court may have in the absence of this subsection;

(2) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(3) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percentum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(4) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(5) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

iii. As used in this section, the term-

(1) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(2) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(3) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(4) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

§ 11501. Tax discrimination against rail transportation property

(a) In this section--

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment

jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same ass jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of the courts of the United States and the States, to prevent a violation of subsection 9b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under

statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

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In The

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,

Petitioner,

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

JAMES R. SCHADEL
(Counsel of Record)
DAVID L. HABER
WEINHEIMER, SCHADEL
& HABER, P.C.
602 Law and Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219
(412) 765-3399

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether an assessment by the Commonwealth of Pennsylvania against a railroad for a small portion of the construction cost of a bridge which crosses the railroad right-of-way is a tax within the meaning of 49 U.S.C. § 11501.

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STATEMENT OF THE CASE

The Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501 was enacted to ensure the fair treatment of railroads by local governmental agencies. The purpose of the Act was not to give railroads a free ride but only a fair ride. The interpretation of § 11501 urged by the petitioners would create a free ride for railroads and run contrary to the intent of Congress and decisions of this Court.

The Wheeling & Lake Erie Railway Company subleases a railroad right-of-way in Scott Township, Pennsylvania, which passes under Old Washington Pike. The bridge which carried Old Washington Pike over the railroad right-of-way became so deteriorated that it was closed in 1982. A new bridge was constructed.

The Pennsylvania Public Utility Commission regulates the construction and maintenance of rail-highway crossings, 66 Pa. C.S.A. § 2702. The cost of construction and maintenance of the bridge shall be paid by the public utility, municipal corporation, or the commonwealth in such proportions as determined by the Pennsylvania Public Utility Commission after due notice and hearing. 66 Pa. C.S.A. § 2704. Following a hearing, the Wheeling & Lake Erie Company was assessed only 3% of the construction costs and 15% of the maintenance costs excluding snow and ice removal. The Pennsylvania Public Utility Commission ordered the following additional payments for cost of construction:

(a)	Pennsylvania Department of Transportation	7%
(b)	Scott Township, Pennsylvania	87%
(c)	Consolidated Rail Corporation	3%

The maintenance costs were assessed totally to Scott Township for snow and ice removal and for all other maintenance, 70% to Scott Township and the remaining 30% to be divided equally between the railways. Consolidated Rail Corporation is not a party to this litigation.

The construction of the new bridge allowed Wheeling & Lake Erie Railway Company to maintain its right-of-way as it constructed the same in the early 1900's. Prior to the railway constructing its right-of-way, there was no bridge in the area and the bridge was built only after the railroad developed the right-of-way. The railroad derives a clear and unique benefit from the bridge and was assessed only a very small portion of the construction and maintenance costs of the same by the Pennsylvania Public Utility Commission.

Wheeling filed suit seeking declaratory relief that the assessment violated § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976. Following discovery, all parties filed Cross-Motions for Summary Judgment. On September 3, 1996, the Magistrate Judge issued his Report and Recommendation recommending that Wheeling & Lake Erie Railway Company's Motion for Summary Judgment be granted and that the Motions of the Pennsylvania Public Utility Commission and Scott Township be denied. On October 11, 1996, the District Court adopted the Report and Recommendation and entered an Order permanently enjoining respondents from assessing or collecting from Wheeling & Lake Erie Railway Company any costs associated with the construction or maintenance of the bridge. Timely Notices of Appeal were filed by the Commission and Scott Township.

The Third Circuit Court of Appeals reversed the decision of the District Court. The Third Circuit Court of Appeals held that the assessment by the Public Utility Commission against Wheeling & Lake Erie Railway Company for a small portion of the construction and maintenance costs of the bridge, which crossed their right-of-way and from which they derived a clear and direct benefit, was not a tax within the meaning of § 11501.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS.

The statute at issue does not define the term "tax" and therefore the Third Circuit Court of Appeals properly began its analysis with this Court's decision in *Department of Revenue of Oregon v. ACF Industries*, 510 U.S. 332, 114 S.Ct. 843, 127 L.Ed. 2d 165 (1994); the only decision of this Court interpreting the applicable section of the Railroad Revitalization and Regulatory Reform Act of 1976. In *Department of Revenue of Oregon v. ACF Industries, supra.*, this Court set forth the standard to be applied in determining whether the assessment at issue was a "tax" within the meaning of § 11501(b)(4).

> "In determining the breadth of a federal statute that impinges upon or pre-empts the state traditional powers, we are hesitant to extend the Statute beyond its evident scope. We will interpret a Statute to pre-empt the traditional state

> powers only if that result is 'the clear and manifest purpose of Congress.' ".

Id. at 345, 114 S.Ct. at 850-51 (citations omitted). Applying this standard, the Third Circuit properly concluded that the assessment was not a tax within the meaning of the statute.

In *Department of Revenue of Oregon v. ACF Industries, supra.*, this Court considered a challenge to a state tax system with exempted certain property from taxes, but not railroad property. The Court determined that this challenge could not be made under § 11503(b)(4). After analyzing the language of the Act, the Court concluded that the tax simply did not fall within the meaning of § 11503(b)(4). The Court also set forth the extent of the exemption granted under this section.

The Court initially determined that § 11503(b)(4) sets limits upon the taxing authorities of state government. The Court concluded that it will only interpret a statute to pre-empt a traditional state power if that result is a clear and manifest purpose of Congress. In the present matter, § 11503(b)(4) does not meet the standard in relation to an assessment against a railroad for a small portion of the cost of constructing a bridge which crosses the railroad's right-of-way. Nowhere in the statute or legislative history is there any reference to assessments for construction projects such as a bridge or a culvert. Finding this assessment to be a "tax" would go beyond the clear intent and purpose of Congress.

Nothing in the legislative history would suggest that the railroads in pressing for the passage of this Act were

concerned about assessments for construction and maintenance costs of bridges at railroad crossings. Congress was not attempting to limit the authority of states to assess railroads for the costs of construction or maintenance of bridges at railroad crossings in passing the Railroad Revitalization and Regulatory Reform Act. Prior to the passage of the Act, states, including Pennsylvania, were assessing railroads a portion of the costs of construction at railroad crossings. *See Department of Highway v. Pennsylvania Public Utility Commission*, 182 A.2d 267 (Pa. Super. 1962); *Chicago & Northwestern Transportation Company v. Webster County*, 71 F.3d 265 (8th Cir. (Iowa) 1995). Nothing in the legislative history suggests Congress intended to change or forbid this long standing practice.

The only decision of another circuit addressing the issue of whether an assessment is a tax within the meaning of the Act, determined that such assessment was not a tax. In *Chicago & Northwestern Transportation Company v. Webster County, supra.*, the defendant decided to enlarge the drain through the railroad's right-of-way and ordered the railroad to install new culverts. The railroad refused and the defendant proceeded to install the culverts and subsequently billed the railroad. After the railroad refused to pay, suit was brought against the railroad to collect the costs. The state action seeking the cost of building the culverts was stayed and the railroad brought suit in Federal Court seeking a declaration that the cost of the culvert was a discriminatory tax within the meaning of § 11503(b).

In deciding that the assessment was not a tax, the Eighth Circuit initially reviewed prior case law of this

Court regarding the definition of a tax. The Court initially reviewed the definition of a tax in the *Head Money Cases*, 112 U.S. 580 (1884). The Court in that case determined that a tariff imposed upon ship owners of $0.50 for each immigrant passenger was not a tax. The Court concluded that it was not a tax because the money raised did not go to the general support of government, but instead solely to regulate immigration. Likewise, the assessment herein does not raise revenue for the general fund of the Township or Commonwealth. This definition of taxes has been reiterated in subsequent cases, and was followed by the Third Circuit and Eighth Circuit in finding assessments are not taxes under § 11503.

The decision of the Third Circuit Court of Appeals and the Eighth Circuit in *Chicago & Northwestern Transportation, supra.*, properly concluded that the Congress did not intend to forbid a long standing practice of states assessing railroads a portion of the construction costs for railroad crossings. In both instances, the Courts concluded that the Railroad Revitalization and Regulatory Reform Act did not preclude a state from assessing a portion of that cost to the railroad. In both instances, the railroad benefitted from the construction at the crossing, and was properly assessed a portion of the costs. The railroad is only being required to pay a portion of a construction project for which they received a unique and direct benefit. Only the railroad requires the crossing be built so it is able to maintain their right-of-way. Congress did not preclude states from making assessments against railroads for improvements at railroad crossings.

The traveling public and railroad must share a railroad crossing and improvements to the crossing benefit

both groups. The bridge was built and must be maintained in order to allow the railroad to maintain its right-of-way. The Pennsylvania Public Utility Commission is empowered to regulate crossings in order to protect the public's safety and rights of all utilities. 66 Pa. C.S.A. § 2702. The railroad in this matter clearly derived a benefit from the construction and maintenance of the bridge. The Pennsylvania Public Utility Commission determined the cost of that benefit to be 3%. The legislative history does not support the argument that Congress intended to strip states of power to regulate railroad crossing by assessing a railroad a portion of construction costs in order to allow the railroad to maintain its right-of-way and the state to protect the safety of both the railroad and the traveling public. Both Circuit Courts addressing this issue have properly held that the assessments for improvements at railroad crossings are not a tax within the meaning of the Act.

The petitioner also argues that the ruling by the Third Circuit Court of Appeals leads to an anomalous result by holding that an assessment by the Public Utility Commission is not a tax for purposes of § 11501, but is a tax for purposes of 45 U.S.C. § 546(b) and § 581(c)(5) [now 49 U.S.C. § 2430(k) and (l)], statutes which exempted the National Railroad Passenger Corporation and certain commuter authorities such as Southeastern Pennsylvania Transportation Authority from state and local taxation. In *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission*, 848 F.2d 436 (3rd Cir. (Pa.) 1988), the Third Circuit was considering the extent of the exemption granted to Amtrak under § 546(b) which provides:

> "Notwithstanding any other provision of law, the National Railroad Passenger Corporation, the 'corporation' shall be exempt from *any taxes or other fees* imposed by any State, political subdivision of the State, or local taxing authority which are levied on the corporation, or any railroad subsidiary thereof, from and after October 1, 1988 . . . " (Emphasis added.)

The precise issue considered by the Court was whether the phrase "any taxes or other fees" covered charges imposed against Amtrak for the building and maintenance of a bridge which crosses their tracks. In reaching its conclusion that the statute reached and exempted Amtrak from assessments for the construction and maintenance of bridges which crossed the railroad, the Court relied on various points of law in statutory construction:

(a) When a tax exemption is granted to a private entity, the statutory language is construed closely;

(b) The intent of the legislature is pivotal in determining the extent of any tax exemption;

(c) Amtrak is not a private entity and is closely aligned to the Federal Government, and therefore, the Court will interpret the exemption at issue consistent with federal immunity from local taxes. The Court in reaching its decision was guided by the principles of federal supremacy; and

(d) The statute was given a broad interpretation to fulfil the perceived intent of Congress.

Initially, the plaintiff herein is not aligned with the Federal Government but rather a private entity such that it cannot claim any federal tax exemption or rely on the principles of federal supremacy. Rather, the interpretation of the statute at issue in this case must be construed narrowly and not broadly as was done in the Amtrak case. In *Department of Revenue of Oregon v. ACF Industries, supra.*, this Court determined that § 11503(b) should be narrowly construed since Congress is attempting to restrict the powers of the state to impose taxes on private entities. The intent of Congress is paramount in the interpretation of the statute limiting the powers of states to tax, and the Court in the Amtrak decision was not determining Congressional intent with regard to the Railroad Revitalization and Regulatory Reform Act.

Additionally, in the Amtrak decision, the Third Circuit Court of Appeals did not rule whether construction and maintenance costs were a tax. The phrase at issue in the Amtrak decision was "taxes or other fees" and the Court never specifically addressed whether assessments would be a tax, even under the statute applicable to Amtrak. Therefore, the decision herein, and the decision by the Third Circuit in the *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission*, are not in conflict and do not create an anomaly in Pennsylvania.

The Third Circuit Court of Appeals properly concluded that the assessment by the Pennsylvania Public Utility Commission was not a tax within the applicable statute by relying on prior decisions of this Court. Furthermore, the decision of the Third Circuit Court of Appeals is in agreement with the decision of the Eighth

Circuit Court of Appeals, the only other Circuit Court to rule upon the issue of whether assessments are taxes within the meaning of the applicable statute.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES R. SCHADEL
(Counsel of Record)
DAVID L. HABER
WEINHEIMER, SCHADEL
& HABER, P.C.
602 Law and Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219
(412) 765-3399

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IN THE

Supreme Court of the United States

WHEELING AND LAKE ERIE RAILWAY COMPANY,
Petitioner,
v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION, SCOTT TOWNSHIP, PENNSYLVANIA; AND JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION

DAVID A. SALAPA *
Assistant Counsel
JOHN B. WILSON
Counsel
BOHDAN R. PANKIW
Chief Counsel
PENNSYLVANIA PUBLIC UTILITY COMMISSION
PO Box 3265
Third and State Streets
Harrisburg, PA 17105-3265
(717) 783-2840
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the Court of Appeals correctly rule that the Pennsylvania Public Utility Commission's allocation of a portion of the costs to Wheeling and Lake Erie Railway Company for replacing a highway bridge over its facilities was not a tax pursuant to 49 U.S.C. § 11501 where prior decisions of this Court have held that such allocations are an exercise of the States' police power?

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IN THE

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No. 99-86

WHEELING AND LAKE ERIE RAILWAY COMPANY,
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PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION, SCOTT TOWNSHIP, PENNSYLVANIA; AND JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION

Respondents, Pennsylvania Public Utility Commission, David W. Rolka, Joseph Rhodes, Jr., John M. Quain, Lisa Crutchfield, and John Hanger (Commission) respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Third Circuit Court of Appeals in this case. The Court of Appeals' opinion is reported at 141 F.3d 88.

ARGUMENT

The Court of Appeals' ruling that the Commission's allocation of costs to the Petitioner is not a tax is consistent with the prior decisions of this Court.

The Court of Appeals correctly overruled the decision of the District Court and correctly held that the Commission's allocation of a portion of the costs to Wheeling and Lake Erie Railway Company for replacement of a highway bridge over its facilities was not a tax pursuant to 49 U.S.C. § 11501. The Court's ruling does not conflict with any decision of this Court nor with any decision of any other Court of Appeals. The case does not warrant this Court's review.

The Petitioner argues that the Court of Appeals incorrectly construed 49 U.S.C. § 11501 in determining that the Pennsylvania Public Utility Commission's allocation of a portion of the costs to the Petitioner for replacement of a highway bridge over the Petitioner's facilities was not a tax. The statute at 49 U.S.C. § 11501 does not define the term "tax." Furthermore, the statute does not state that rail-highway crossing construction and maintenance costs are covered. Faced with this lack of specificity, the Court of Appeals had to determine whether the term "tax" included rail highway crossing construction and maintenance costs.

The Court of Appeals noted this Court's decision in *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994) which stated that 49 U.S.C. § 11501(b)(4) should be interpreted narrowly. 141 F.3d at 94. The Court of Appeals stated that in determining whether rail-highway crossing construction and maintenance costs were to be considered taxes under 49 U.S.C. § 11501, it should consider the context of the term "tax" and the Congressional policy underlying the statute. 141 F.3d at 95. The

Court of Appeals observed that the Pennsylvania Public Utility Commission's authority to allocate rail-highway crossing costs to railroads and other parties has existed since 1913, long before Congress enacted 49 U.S.C. § 11501. 141 F.3d at 96. The Court of Appeals concluded that Congress did not intend to treat the Pennsylvania Public Utility Commission's allocation of rail-highway crossing costs as a tax when it enacted 49 U.S.C. § 11501. The Court of Appeals' conclusion is consistent with prior decisions of this Court.

Prior to Congress enacting 49 U.S.C. § 11501, this Court consistently upheld the authority of the States to allocate the costs of construction and maintenance of at-grade, above-grade and below-grade crossings to railroads. See *Chicago, Burlington and Quincy Railroad Company v. Chicago,* 166 U.S. 226 (1897) (Cost of construction and maintenance of new at-grade crossing); *New York and New England Railroad Company v. Bristol,* 151 U.S. 556 (1894) (Cost of construction and maintenance of new grade separated crossings); *Chicago, Burlington and Quincy Railroad Company v. Nebraska,* 170 U.S. 57 (1898) (Cost of maintenance of highway bridge); *Cincinnati, Indianapolis and Western Railway Company v. Connersville,* 218 U.S. 336 (1910) (Cost of constructing railroad bridge over highway). In upholding the States' authority to allocate these costs to railroads, this Court has never found such allocations to be an exercise of the States' taxing power. Rather, this Court has consistently held that these cost and maintenance allocations were part of the States' police powers to control occupancy of their public streets in order to assure the safety of the public. *See Erie Railroad Company v. Public Utility Commission,* 254 U.S. 394 (1921); *Atcheson, Topeka and Santa Fe Railway v. Public Utility Commission,* 346 U.S. 346 (1953).

Congress is presumed to know about existing law related to the legislation it enacts. *Goodyear Atomic Corporation v. Miller,* 486 U.S. 174 (1998). Congress would have been aware from this Court's decisions that the States' allocation of rail highway crossing construction and maintenance costs was not a tax when it enacted 49 U.S.C. § 11501. Congress would also have been aware that these allocations had a financial impact on the railroads. Had Congress wished to include those costs as covered by the statute it could have done so by stating that in the statute. Congress did not do this. In all the hearings and committee reports on 49 U.S.C. § 11501, Congress did not even debate whether these costs should be prohibited by the statute. In fact, neither the hearings or committee reports on the legislation mention rail highway crossing construction and maintenance costs. The lack of specific language in the statute referring to rail highway crossing costs and the lack of references to rail highway crossing costs in the legislative history of the statute, combined with Congress' presumed knowledge of this Court's prior decisions, leads to the conclusion that Congress never intended 49 U.S.C. § 11501 to apply to such costs.

The Petitioner cites *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania, Pa. P.U.C.,* 848 F.2d 436 (3rd Cir. 1988), *cert. denied,* 488 U.S. 893 (1988) and *SEPTA v. Pa. P.U.C.,* 826 F. Supp. 596 (E.D. Pa. 1993), *aff'd,* 27 F.3d 558 (3rd Cir. 1994), *cert. denied,* 115 S. Ct. 318 (1994) as support for its contention that the rail highway crossing construction and maintenance costs imposed by the Commission are a tax. The Court of Appeals found these cases inapplicable. The Court of Appeals concluded that the definition of tax was a matter of federal law as drawn from Congressional policy underlying the statute. 141 F.3d at 95. The

Court of Appeals found that the policy underlying the statutes at issue in *National Railroad Passenger Corporation* and *SEPTA* was different from the policy underlying 49 U.S.C. § 11501. The Court of Appeals found that Congress intended that National Railroad Passenger Corporation and SEPTA be exempt from state and local taxes and fees to the same extent as the federal government. 141 F.3d at 95. The Court of Appeals did not find any such intent when Congress enacted 49 U.S.C. § 11501. The Court of Appeals concluded that the rail highway crossing construction and maintenance costs imposed by the Commission were not a "tax" for purposes of 49 U.S.C. § 11501 even though they were a "tax or other fee" in the *National Railroad Passenger Corporation* and *SEPTA cases.* 141 F.3d at 96.

The Commission believes that its rail highway crossing construction and maintenance cost allocations are not "taxes" for purposes of 49 U.S.C. § 11501 or "taxes or other fees" for purposes of the statutes at issue in the *National Railroad Passenger Corporation* and *SEPTA* decisions and that this Court should overrule the Court of Appeals' decisions in *National Railroad Passenger Corporation* and *SEPTA*. The Court of Appeals for the Second Circuit has refused to follow the Third Circuit's rationale. *National Railroad Passenger Corporation v. City of New York,* 882 F.2d 710 (2nd Cir. 1989). Pennsylvania appellate courts have also refused to follow the Court of Appeals for the Third Circuit. *City of Philadelphia v. Pa. P.U.C.,* 676 A. 2d 1298 (Pa. Commw. Ct. 1996), *alloc. denied,* 546 Pa. 657 (1996), *cert. denied,* 520 U.S. 1155 (1997); *SEPTA v Pa. P.U.C.,* 592 A.2d 797 (Pa. Commw. Ct. 1991), *alloc. denied,* 611 A.2d 714 (1992).

The Court of Appeals for the Third Circuit also rejected the Petitioner's argument that the allocation of rail

highway crossing maintenance and construction costs to it constitutes a tax because such an allocation relieves the government entities of a portion of the costs of building and maintaining the bridge. 141 F.3d at 97. The Court of Appeals found that the allocation of construction and maintenance costs to the Petitioner did not contribute to the general fund of either the Commonwealth of Pennsylvania or the local government entities and is specific to a particular crossing. These facts led the Court to conclude that the allocation was not a tax. The Court of Appeals cited *Chicago and Northwestern Transportation Company v. Webster County*, 71 F.3d 265 (8th Cir. 1995) and *Union Pacific Railroad Company v. Public Utility Commission of Oregon*, 889 F.2d 854 (9th Cir. 1990) as cases where the Courts of Appeals held that certain levies were not taxes even though they relieved state or local government entities of financial burdens. 141 F.3d at 97. The mere fact that the state or local government is relieved of a financial burden is not dispositive on the issue of whether a particular levy is a tax for purposes of 49 U.S.C. § 11501.

The Petitioner has failed to recognize that the States have the authority to regulate the occupancy and use of their public streets in order to promote safety and prevent accidents pursuant to their police powers. Any entity seeking to occupy a portion of the public highway, including any portion above or below that public highway must seek approval from the State and comply with the State's terms and conditions for that use or occupancy. The Pennsylvania Public Utility Commission exercises authority over rail highway crossings and the railroad occupancy of public highways in the Commonwealth of Pennsylvania. The Petitioner may occupy the public highways of the Commonwealth of Pennsylvania subject to the terms and conditions determined by the Pennsylvania

Public Utility Commission as necessary to promote safety and prevent accidents. In this case, the Pennsylvania Public Utility Commission concluded that the Petitioner benefited from the new highway bridge constructed over its facilities and allocated a portion of the construction and maintenance costs for the bridge to it based on the benefit the Petitioner received. The statute at 49 U.S.C. § 11501 does not alter the Petitioner's obligation to comply with the Pennsylvania Public Utility Commission's order.

CONCLUSION

Further review by this Court is not warranted. This Court should deny the petition for writ of certiorari.

Respectfully submitted,

DAVID A. SALAPA *
Assistant Counsel
JOHN B. WILSON
Counsel
BOHDAN R. PANKIW
Chief Counsel
PENNSYLVANIA PUBLIC UTILITY COMMISSION
PO Box 3265
Third and State Streets
Harrisburg, PA 17105-3265
(717) 783-2840
* Counsel of Record

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